(1) Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1999

THOMAS R. HUTCHINSON, individually and as personal representative of the Estate of Robert W. Hutchinson, deceased, and the Estate of Anne E. Hutchinson, deceased,

Petitioner,

versus

IRA SPANIERMAN, individually and as an agent of Ira Spanierman, Inc., Spanierman Gallery, and Kennedy Galleries, Inc.; IRA SPANIERMAN, INC., a voluntarily dissolved New York corporation; SPANIERMAN GALLERY, an unincorporated association; ROBERT H. HAHN, individually and as a member of Bamberger, Foreman, Oswald, and Hahn; BAMBERGER, FOREMAN, OSWALD AND HAHN, a general partnership; and RITA DEERE, individually and as an agent of Robert H. Hahn and Bamberger, Foreman, Oswald and Hahn,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an appellate court, reviewing a summary judgment, must determine that the district court applied the controlling law before affirming that judgment, *i.e.*, whether the scope of its independent appellate review must extend beyond a determination that the district court made no errors in applying the law to the undisputed facts to a determination that it applied the proper law.

Whether an appellate court, reviewing a summary judgment, should use the standard articulated in Federal Rule of Civil Procedure 50(a)(1) for the granting of a motion for judgment as a matter of law as a reference point in determining whether the district court applied the controlling law.

Whether terms set out in italics below are implicit in Rule 40(a)(2) of the Federal Rules of Appellate Procedure and, if so, whether an appellate court may summarily deny a petition for rehearing that makes the *prima facie* showing prescribed by that rule without violating the petitioner's right to due process of law under the Fifth Amendment:

> The petition must state with particularity each *holding that conflicts with a controlling statute or decision,* point of law *decisive of the case and duly submitted by counsel,* or *material* fact that the petitioner believes the court has overlooked or misapprehended . . . .

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in *Hutchinson v. Spanierman* is reported at 190 F.3d 815 (7th Cir. 1999) (App. A at 1a). The orders and opinions of the district court in *Hutchinson v. Spanierman,* No. EV 90-44-C (S.D. Ind. Jan 22, 1997 and May 13, 1997) (App. B at 22a and App. C at 47a), are not reported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered September 10, 1999. The panel denied a timely-filed petition for rehearing on November 4, 1999 (App. D at 64a). On January 19, 2000, the Court granted petitioner's application and extended the time within which he could file a petition for a writ of certiorari to and including February 14, 2000 (App. E at 66a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

CONSTITUTIONAL PROVISION AND PROCEDURAL RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part: "nor shall any person . . . be deprived of life, liberty or property without due process of law."

Rule 56(c) of the Federal Rules of Civil Procedure provides in relevant part: "The judgment sought shall be rendered forthwith if . . . the moving party is entitled to judgment as a matter of law."

Rule 40(a)(2) of the Federal Rules of Appellate Procedure provides in relevant part: "The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . . ."

STATEMENT OF THE CASE

Questions presented by this petition arise from a case within a case -- a 1980 partition action that is the subject of a 1990 action the principal targets of which are Ira Spanierman, a New York art dealer and defendant in the 1980 action, and Robert Hahn, the Indiana lawyer who filed the partition action on behalf of Robert W. Hutchinson, the father of petitioner Thomas R. Hutchinson ["Hutchinson"].

Hutchinson invoked the district court's federal question and diversity jurisdiction, pursuant to 28 U.S.C. §§ 1331 and 1332(a)(1), when he filed the 1990 action. The federal statute involved is 18 U.S.C. § 1961, *et seq.*, the Racketeer Influenced and Corrupt Organizations Act. Plaintiff-petitioner Thomas R. Hutchinson was the personal representative of the estates of his father, Robert W. Hutchinson, and sister, Anne E. Hutchinson, and a citizen of the State of Washington. Defendant-respondent Ira Spanierman is a citizen of New York. Defendant-respondent Ira Spanierman, Inc. was a corporation incorporated under New York law on January 9, 1969, and voluntarily dissolved in 1987; its principal place of business was in New York. Defendant-respondent Spanierman Gallery is an unincorporated association having its principal place of business in New York; its only known member is respondent Ira Spanierman. Defendants-respondents Robert H. Hahn and Rita Deere are citizens of Indiana. Defendant-respondent Bamberger, Foreman, Oswald and Hahn is a law firm organized as a general partnership under Indiana law; its members are citizens of Indiana or states other than Washington. The jurisdictional amount exceeds, exclusive of interest and costs, the sum of $50,000.00.

The case within the case was also the subject of the motion for summary judgment Hahn and his firm [collectively "Hahn"] filed in the 1990 action. In this motion, Hahn argued that Hutchinson could not establish the causation element of his

malpractice and collusion claims. According to Hahn, Robert Hutchinson's claim to one-half ownership of the Collection was barred by limitations and laches and actions for conversion, breach of trust and constructive trust were statute-barred.

In setting out the facts material to consideration of the questions presented, particularly those related to the case within the case, petitioner was guided by two axioms. First, "the way questions of law are decided and reviewed in our system [is that] the adversaries present their versions of the law to the court and the court renders its determination after making an independent assessment of what the law is." *Elder v. Holloway*, 984 F.2d 991, 993-94 (9th Cir. 1993) (Kozinski, J., dissenting from denial of reh'g en banc). Second, "[e]very issue in every case turns on both fact and law, facts outside a legal framework are as irrelevant as abstract legal principles." *Id.* at 993.

The case within the case.

"Partition is a proceeding to enforce a right to division of property and to have shares set off in severalty." *Pavy v. Pavy*, 121 Ind.App. 194, 98 N.E.2d 224, 226 (1951). A cotenant whose title to an undivided share is clear is entitled to partition as a matter of right so he may hold and enjoy his property in severalty. *Willard v. Willard*, 146 U.S. 116, 120 (1892). "[T]he right to partition exists from the date of the tenancy. It may or may not be exercised, in the discretion of the tenants." *Jenkins v. Dalton*, 27 Ind. 78, 81 (1866). The fact that a period of time greater than that prescribed by any statute of limitations elapses does not in any manner affect the right of one or more of the cotenants to have partition. *Id.*

If the possession of one cotenant of personalty excludes the other, the cotenant out of possession may seek partition because both are equally entitled to possession. *Robinson v. Dickey*, 143 Ind. 205, 42 N.E. 679, 680-81 (1896).

Relief sought by pleadings filed on behalf of petitioner's father in the 1980 case was an order declaring his right, title, and interest in the Theodore Robinson Collection and "partition[ing] in kind [] the Theodore Robinson Collection between the plaintiff, Robert W. Hutchinson, and the defendants or a sale thereof and a division of the profits from such sale." Robert W. Hutchinson never pursued a trust theory or sought damages for conversion or breach of trust in the 1980 action.

The Theodore Robinson Collection ["Collection"] is a term used to describe paintings, drawings, diaries, and other personal property that once belonged to American Impressionist Theodore Robinson and were inherited by his brother Hamline Robinson when the artist died in 1896.

When Hamline Robinson died, intestate, in 1907, his widow and two daughters inherited the Collection, as cotenants, by operation of Missouri law, its statutes of intestate succession. Each owned an undivided one-third interest in this unadministered asset of Hamline's estate. Upon the death, intestate, of his widow Florence in 1927, Ellen ("Nellie") Robinson Terhune and Florence ("Fonnie") Robinson Hutchinson inherited their mother's unadministered interest. The two sisters then had equal, but undivided, ownership interests in everything that comprised the Collection.

The Collection was never the subject of a voluntary partition. Instead, it remained intact from 1907, when Hamline died, until 1966, when Margaret Thompson, his granddaughter and the daughter and heir of Nellie Terhune sold approximately 140 items to Ira Spanierman unbeknownst to her cousin, Robert Hutchinson, Fonnie's sole surviving heir and the grandson of Hamline Robinson.

From 1907 to 1927, the Collection was in the possession of Florence Robinson and Nellie Terhune. From 1927 to 1964,

when Nellie died, the Collection remained in her possession. In 1936, however, most of the paintings were placed in a Kansas City museum for safekeeping. The remainder hung in homes where Nellie lived, first in Kansas City, Missouri, and later with her daughter Margaret Thompson in Evansville, Indiana.

In 1945, shortly before her younger sister died, Nellie told her nephew Robert Hutchinson he would inherit Fonnie's share of the Collection when his mother died, less the $400 the Terhunes had loaned the Hutchinsons to pay Fonnie's medical bills. Nellie recognized Robert Hutchinson's legal interest in the Collection again in 1952 when he visited her in Indiana.

Soon after Nellie's death, Margaret Thompson retrieved that part of the Collection which had been left with the Kansas City museum. She concealed this fact and the 1966 sale from her cousin when they spoke by telephone after Robert Hutchinson learned of Nellie's death and in 1974, when he confronted her in Evansville about dividing the Collection. At that time, Margaret told her cousin that the paintings had been pledged as collateral for a loan, begged Robert not to go to the bank, and agreed to settle the matter with him after the loan was repaid.

In 1980, when he learned that a painting that was in the Thompsons' home in 1974 had been sold to Cornell University, Robert Hutchinson filed a partition action in the United States District Court for the Southern District of Indiana against his cousin and her husband. The following year, Ira Spanierman and Ira Spanierman, Inc. were added as defendants. When the 1980 action was filed, the Thompsons had possession of twenty-nine paintings and other items from the Collection. Spanierman never disclosed information about items from the Collection that were in his possession during the pendency of the 1980 action although it was sought in both the 1980 and 1990 actions. Items from the Collection that were no longer in the possession of Margaret Thompson or Ira Spanierman, *e.g.*, paintings that

Spanierman bought from Margaret Thompson in 1966, but had sold in the interim, could not have been the subject of a decree of partition in the 1980 action.[1]

To maintain an action for partition, title and possession or the right of possession must concur in the plaintiff. *Schori v. Stevens*, 62 Ind. 441, 448 (1878).

Because Robert Hutchinson and his cousin Margaret Thompson claimed title to the Collection from their grandfather Hamline Robinson, "it is sufficient for [him] to deduce his title from the common source of title." *See Nitche v. Earle*, 117 Ind. 270, 19 N.E. 749, 752 (1889); *Millis v. Roof*, 121 Ind. 360, 23 N.E. 255, 256 (1890). This was done by admissions on file in the 1980 case, admissions by Margaret Thompson that Nellie and Fonnie were sisters, that their parents died intestate, and that she claimed title to the Collection from Hamline Robinson.

Possession of the Collection by Hamline's widow and older daughter and later by Nellie alone was deemed to be the constructive possession of Fonnie Hutchinson and later her son Robert. *See Chapman v. Kullman*, 191 Mo. 237, 89 S.W. 924, 926 (1905). To overcome the presumption that a cotenant is holding possession for his cotenants, the cotenant in possession must show acts which constitute disseizin or repudiation or denial of the rights of his cotenants, show his intention to hold adversely to the cotenant out of possession, and are totally irreconcilable with recognition of his cotenant's rights. *Bass v. Rounds*, 311 S.W.2d 775, 778 (Mo. App. 1991). Strong proof

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[1] Once located, these paintings can be made the subject of other partition actions. *See Davis v. Lottich*, 46 N.Y. 393, 397 (1871) (if a cotenant in possession "sells or converts the property, the co-tenant or joint owner may, at his option, have his action for damages for conversion, or hold his title with the purchaser. He cannot be deprived of his property without his consent, or without redress . . . .").

is required to overcome this presumption. *Russell v. Russell*, 540 S.W.2d 626, 634 (Mo. App. 1976); *Hare v. Chisman*,230 Ind. 333, 101 N.E.2d 268, 270 (1951); *Tarbox v. Hulett*, 272 App. Div. 633, 75 N.Y.S.2d 37, 38 (1947). The record in the 1980 case is devoid of evidence that would overcome the presumption that Fonnie and Robert Hutchinson had constructive possession of every item in the Collection from 1907, when Hamline died, until Robert's death in 1987.

Indiana law has long recognized that "[w]hen one cotenant holds possession to the exclusion of others, claiming to own the whole, and holding it adversely to the other cotenants, then an action for partition by a cotenant would be barred." *Peden v. Cavins*, 134 Ind. 493, 34 N.E. 7, 8 (1892). "To make a plea of the statute of 15 years a good defense to a suit for partition, it must show a holding adversely for 15 years." *Id.*

Margaret Thompson pled adverse possession for fifteen years as an affirmative defense to Robert Hutchinson's partition action, but abandoned that defense when she sought summary judgment.[2] Ira Spanierman never pled or attempted to prove, in the 1980 or 1990 action, that he acquired Robert Hutchinson's title to any item in the Collection by adverse possession.

It appears that no Indiana court has ever recognized that laches is a good defense to a suit for partition. Jurisdictions that

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[2] Her motion raised three issues, all of which dealt with trust theories that had not been pled. The district court granted Margaret's motion, but did not enter summary judgment. Instead, after holding that Robert Hutchinson's intestate interest "expired due to laches," it dismissed the action, consistent with a second holding that it was a classic case for abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), *i.e.*, the proper place for the argument that Robert has an intestate interest in the Collection is an Indiana or Missouri probate court. Hahn recommended against appealing the trial court's order.

have considered and decided the issue hold that laches provides no defense to an action for partition until one cotenant acquires the other's title by limitation, *i.e.*, adverse possession. *See, e.g., Ashley v. Garrett*, 218 Ark. 126, 234 S.W.2d 513, 515 (1950); *Harlan v. Douthit*, 379 Ill. 15, 39 N.E.2d 345, 349-50 (1942); *Clarke v. Clarke*, 349 Ill. 642, 183 N.E. 13, 15-16 (1932); *Gibson v. Gibson*, 205 Iowa 1285, 217 N.W. 852, 855 (1928); *Cheeks v. Harrington*, 523 So.2d 1033, 1035-36 (Miss. 1988).

Seventh Circuit's limited review of the District Court's laches ruling in the 1990 case.

Hahn's summary judgment motion was granted by the district court (App. B at 22a-46a), as was the Spanierman defendants' subsequently filed motion (App. C at 47a-63a). Based on findings that Robert Hutchinson's ability to establish joint ownership of the Collection was barred by laches, that his partition action was barred by the two-year statute of limitations applicable to conversion actions, and that he had no standing in 1980 to bring a suit seeking partition, the district court concluded that petitioner could not prove the causation or damages elements of his legal malpractice, collusion, and RICO claims (App. B at 31a-34a, 45a-46a; App. C at 58a-61a, 63a).

The Seventh Circuit's affirmance of summary judgment rested on its "agree[ing] that the doctrine of laches precluded Robert Hutchinson from establishing an ownership interest in the art collection at issue." (App. A at 3a).

Established legal principles -- the law of cotenancy and partition, honed over centuries, and the fact that "the common law came into being recognizing [the differences between cotenants and those who own property in severalty], and creating such rules as their existence made necessary," A.C. Freeman, *Cotenancy and Partition: A Treatise on the Law of Co-Ownership as It Exists Independent of Partnership Relations Between*

the Owners § 150 at 227-28 (2d ed. 1886), were all but ignored by the Seventh Circuit in its decision in this case.

At no point in its opinion did the Seventh Circuit consider or decide whether laches is a good defense to a suit for partition,[3] *i.e.*, whether such a defense can be maintained under the controlling law, absent evidence of adverse possession for the statutory period.

Instead of deciding this threshold legal issue and its corollary, *i.e.*, whether the district court applied the controlling law, the appellate court shifted its focus. In doing so, the scope of its *de novo* review narrowed to whether the lower court made any errors in applying the law to the facts, law it identified as follows:

> It is a fundamental rule of law that one who sleeps on his rights loses them. "[L]aches addresses delay in the pursuit of a right when a party must assert that right in order to benefit from it." *Williams v. Rogier*, 611 N.E.2d 189, 196 (Ind. Ct. App. 1993). The doctrine of laches

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[3] Ironically, a rhetorical question about the applicability of laches to the 1980 partition action is found in the first sentence of the Seventh Circuit's analysis of the district court's laches ruling:

> We agree with the district court's reasoning that *if the doctrine of laches applied to the 1980 Case with respect to Robert's ability to establish an ownership interest in the art collection,* Thomas Hutchinson's claims would necessarily fail. Without being able to show an ownership interest in the art collection, Robert Hutchinson would have been unable to demonstrate the legally protected interest required to seek partition . . . . (App. A at 11a) (emphasis added).

> "bars a party's rights when the party has unreasonably delayed their assertion so as to cause prejudice to the opposing party." *Hawxhurst v. Pettibone Corp.*, 40 F.3d 175, 181 (7th Cir. 1994). In civil matters, the doctrine of laches consists of three elements: (1) inexcusable delay in asserting a right; (2) implied waiver from knowing acquiescence in existing conditions; and (3) circumstances resulting in prejudice to the adverse party. *See In re Geisler*, 614 N.E.2d 939, 940 (Ind. 1993); *see also Paternity of K.H.*, 709 N.E.2d 1033, 1036 (Ind. Ct. App. 1999). (App. A at 11a).

Not one of these or other cases, cited to support affirmance of the district court's laches ruling, involved cotenants or partition.[4]

Another question the Seventh Circuit did not consider because of the limited scope of its review is *when*, under controlling law, Robert Hutchinson had to assert his right to have partition of paintings in the defendants' possession to benefit from that right. It recognized, implicitly (although perhaps unconsciously), that this question had to be decided as part of its *de novo* review when it recited the most general of statements of controlling law: "'[L]aches addresses delay in the pursuit of a right *when a party must assert that right in order to benefit from it.*'" (App. A at 11a) (emphasis added).

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[4] Nor did the panel follow circuit practice by considering decisions from other jurisdictions where there is no controlling authority directly on point, *Valerio v. Home Ins. Co.*, 880 F.3d 226, 228 (7th Cir. 1996), after petitioner cited eight cases that hold that laches is no defense to an action for partition until one cotenant acquires the other's title by limitation, *i.e.*, adverse possession for the statutory period.

Holdings in *Jenkins v. Dalton* and *Peden v. Cavins*, quoted on pages 3 and 7 *supra*, which recognize a cotenant's absolute right to seek partition and specify when a cotenant must exercise that right to avoid a bar provide a clear answer to that dispositive, but unasked question.

Because of the limited scope of the Seventh Circuit's review, the subjects of title (ownership) and possession or the right to possession -- elements of Robert Hutchinson's partition action -- were not considered within the framework of the controlling law. Instead, the law applied by the lower court served as the template.

For example, the reviewing court's conclusions about Robert Hutchinson's ownership of property he inherited under Missouri's and California's statutes of intestate succession are couched in terms that mirror the first element of laches -- inexcusable delay in asserting a right:

> Robert Hutchinson's ability to establish an ownership interest in the art collection was dependent upon his ability to show an ownership right in the property acquired by descent. It is his ability to make such a showing that was barred by laches in the 1980 Case. (App. A at 14a).

> By the time Robert Hutchinson got around to asserting his alleged interest in the art collection, those in the best position to shed light on the issues of ownership were deceased. (App. A at 17a).

Under *Nitche v. Earle* and *Millis v. Roof*, cited on page 6 *supra*, the fact that all of the parties to the 1980 case claimed title from a common source and defendants failed to prove they acquired Robert Hutchinson's title by limitation, *i.e.*, adverse

possession for the statutory period, made Robert Hutchinson's fee simple title to and undivided one-half ownership interest in the paintings at issue indisputable.[5] Testimony of witnesses, living or dead, on issues of ownership was and is unnecessary.

Possession, not adverse possession, of the Collection by other heirs and descendants of Hamline Robinson was equated with ownership by the Seventh Circuit, as well as the trial court:

> For Robert Hutchinson to have any ownership interest in the art collection, he would have had to have received this interest from his mother, Florence Hutchinson. However, his mother *never possessed* any pieces of the art collection . . . . (App. A at 14a-15a) (emphasis added).
>
> Both Robert and Florence Hutchinson were armed with the knowledge that *other family members possessed* the art collection, yet they did nothing to protect their alleged ownership interests. (App. A at 16a) (emphasis added).
>
> There is no evidence in any record that Florence Hutchinson ever questioned either *her sister's possession* or her perceived ownership of the art collection. . . . Robert Hutchinson knew of *Ellen Terhune's possession* of the art collection . . . . (App. A at 16a) (emphasis added).

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[5] Robert Hutchinson's seeking a declaration as to ownership of the Collection in pleadings Hahn filed should not give rise to an adverse inference that this "'indicates there was some doubt about the issue.'" (App. A at 13a). Under controlling law, it is proper for a plaintiff to make an issue settling all questions of title in his complaint in partition though he is not required to do so. *Elston v. Piggott*, 94 Ind. 14, 18 (1884).

Under the controlling law of Missouri, Indiana, and New York, however, unrebutted presumptions of fact that cotenants in possession are holding for those out of possession constituted evidence of Fonnie and Robert Hutchinsons' constructive possession of the Collection. Because of the limited scope of its review, the Seventh Circuit equated what constituted proof under the controlling law with a mere allegation:

> Thomas Hutchinson claims that Florence Hutchinson and, then, his father maintained constructive possession of the art collection as co-tenants in the collection with Ellen Terhune and Margaret Thompson. (App. A at 13a).

Evidence that would not have barred Robert Hutchinson from asking a court to partition commonly-owned property in his cousin's possession, under holdings enunciated in *Jenkins v. Dalton* and *Peden v. Cavins,* was viewed by the reviewing court through the lens of the second element of laches -- implied waiver from knowing acquiescence in existing conditions:

> The district court accurately summed up the Hutchinsons' indifference to their rights in the art collection by stating "both [Robert and Florence Hutchinson] knew the Collection *was being possessed and controlled exclusively* by [Ellen Terhune and Margaret Thompson], a condition in which they acquiesced either happily, or without obtaining some writing that would indicate they still maintained an interest in the artwork." (App. A at 17a) (emphasis added).

This assessment, like others quoted above, reflects a narrowed scope of review, one that does not ask if the trial court applied the proper law, but simply whether the law was properly applied to the facts.

Seventh Circuit's summary denial of Hutchinson's petition for rehearing.

Points of law (or mixed law and fact) that Hutchinson contended the Seventh Circuit overlooked or misapprehended in its opinion affirming the district court's laches ruling can be summarized as follows:

1. The Spanierman and Bamberger defendants were not "entitled to judgment as a matter of law."

2. Relevant substantive law was not applied in the context of the 1980 partition action.

3. Because Robert Hutchinson, Margaret Thompson, and Ira Spanierman claim to have derived their respective titles to objects from the Collection through a common source, *i.e.*, Hamline Robinson, Hutchinson did not have to "establish[] an ownership interest in the art collection at issue."

4. Robert Hutchinson had constructive possession and was entitled to seek partition of items from the Collection that were then in defendants' possession.

5. Unrebutted presumptions of fact constitute evidence of Fonnie and Robert Hutchinsons' constructive possession of the Collection.

6. The equitable doctrine of laches could not bar Robert Hutchinson's partition action absent evidence of adverse possession for the statutory period.

7. The panel was required by the Due Process Clause of the Fifth Amendment to actually consider the evidence and argument that Hutchinson presented on appeal.

The petition Hutchinson filed was summarily denied by an Order which stated that "all of the judges on the panel have voted to deny rehearing." (App. D at 65a).

REASONS FOR ALLOWANCE OF THE WRIT

I.

THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS ON THE SCOPE OF REVIEW OF SUMMARY JUDGMENTS

"The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations." *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991). The proper scope of an appellate court's independent review of a district court's grant of summary judgment is the focus of the first of three questions presented by this petition.

The Seventh Circuit limited its *de novo* review of the summary judgment entered in this case to a determination of whether the district court had properly applied the substantive law to undisputed facts in the record. Its review did not extend to a determination of whether the lower court applied the proper law. Two other Courts of Appeals adhere to the same rule. *See Longo v. Shore & Reich, Ltd.*, 25 F.3d 94, 96 (2d Cir. 1994) ("On an appeal from a summary judgment, we review the record *de novo* to determine whether any genuine issue of material fact remains and whether the substantive law has been correctly applied."); *UMLIC-Nine Corp. v. Lipan Springs Dev. Corp.*, 168 F.3d 1174, 1176 (10th Cir. 1998) (the standard imposed by Rule 56(c) "requires us to examine the record in order to determine whether any genuine issue of material fact was in dispute; if not, we determine whether the district court correctly applied the substantive law."), *cert. denied sub nom. Waring v. UMLIC-Nine Corp.*, 120 S.Ct. 499, 145 L.Ed.2d 385 (1999).

Four Courts of Appeals, however, have recently recognized the need to broaden the scope of their *de novo* review of summary judgment decisions and determine whether the district court applied controlling law.[6] *See, e.g., Iberia Foods Corp. v. Romeo,* 150 F.3d 298, 302 (3d Cir. 1998) ("Our task is to identify and explain the substantive law governing the action, and then in light of that law determine whether there is a genuine dispute over dispositive facts."); *Equitable Life Assurance Society of U.S. v. Poe,* 143 F.3d 1013, 1016 (6th Cir. 1998) ("a grant of summary judgment is affirmed on appeal only if three criteria are met: (1) the district court applied the proper law; (2) the district court made no errors applying the law to the facts; and (3) there are no genuine issues of material fact"); *Moreland v. Las Vegas Metropolitan Police Dept.,* 159 F.3d 365, 369 (9th Cir. 1998) ("Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment under the legal principles that govern the case at issue."); *Lantech, Inc. v. Keip Machine Co.,* 32 F.3d 542, 545 (Fed. Cir. 1994) ("On appeal of a grant of summary judgment, we independently determine whether there are any genuine issues of material fact, and if not whether the court erred either in interpreting the governing law or in applying the law to the facts.").

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[6] Whether two other Courts of Appeals employ a limited scope of review, like the Seventh Circuit, or should be listed here cannot be determined because of a latent ambiguity in the phrase each employs, *i.e.,* whether "the relevant law" means the controlling law or simply the substantive law applied by the trial court. *See F.D.I.C. v. Bender,* 127 F.3d 58, 63 (D.C. Cir. 1997) ("Our first task, then, is to ascertain whether a factual dispute existed as to any material fact. If we find there to be no controversy with regard to the material facts, we focus on whether the district court correctly applied the relevant law."); *Makedwde Publishing Co. v. Johnson,* 37 F.3d 180, 181 (5th Cir. 1994) ("We determine whether there are any disputed material facts, and whether the district court correctly applied the relevant law to the undisputed facts.") (internal quotation marks omitted).

A. Favorable resolution of this conflict would assure enforcement of the controlling law, both state and federal, by all of the Courts of Appeals.

"Jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given to this Court in order to secure uniformity of decision." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) (internal quotation marks omitted). Favorable resolution of the conflict regarding the proper scope of review of summary judgment decisions would secure uniformity among the Circuits. It should also "assure enforcement of the controlling law," state and federal, by all of the Courts of Appeals and serve to remind each district court of its "responsibility to assure the fidelity of its judgment[s, including summary judgments,] to the controlling law." *Cf.* Fed. R. Civ. P. 50(a) (advisory committee note, 1991 amendment).

"Independent appellate review necessarily entails a careful consideration of the district court's legal analysis . . . ." *Salve Regina College v. Russell*, 499 U.S. at 232. The scope of that review and analytical framework to be utilized[7] in assessing summary judgment decisions are matters this Court should clarify by granting certiorari. *Cf. Siegert v. Gilley*, 500 U.S. 226, 231 (1991) (certiorari granted to clarify analytical structure under which claim of qualified immunity should be addressed).

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[7] The approach taken by the Sixth Circuit in *Equitable Life Assurance Society of the United States v. Poe*, 143 F.3d 1013 (6th Cir. 1998), appears to be the most comprehensive and analytically sound:

> [A] grant of summary judgment is affirmed on appeal only if three criteria are met: (1) the district court applied the proper law; (2) the district court made no errors applying the law to the facts; and (3) there are no genuine issues of material fact.

143 F.3d at 1016.

Here, as in *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 89 (1994), the parties vigorously disagree as to what the controlling law is. That point should have been, but was not, resolved by the Seventh Circuit on appeal.[8] *Id.; see generally Marbury v. Madison*, 5 U.S. (1 Cranch) 133, 177 (1803) (the Constitution entrusts the power "to say what the law is" to Article III judges). The reason -- the Seventh Circuit limited the scope of its review to a determination of whether the district court properly applied the substantive law to undisputed facts and never determined whether that court applied the proper, *i.e.*, controlling, law.

B. The limited scope of review of summary judgment decisions employed by three Circuits could have a number of untoward effects.

When the Court decided the question presented[9] in *Elder v. Holloway*, 510 U.S. 510 (1994), it spoke with one voice and held "that appellate review of qualified immunity dispositions is to be conducted in light of all relevant precedents, not simply

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[8] Assuming *arguendo* that the Court grants certiorari in this case to resolve the first of the questions presented, it could then exercise one of two options. It could "remand[] the case to the District Court for application of state law" if it finds "that the law of the State was firmly settled." *See Salve Regina College v. Russell*, 499 U.S. at 234-35 (citing *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956)). If not, the case could be remanded to the Court of Appeals "for consideration of the applicable principles of state law." *Id.* (citing *New York Life Ins. Co. v. Jackson*, 304 U.S. 261 (1938), and *Rosenthal v. New York Life Ins. Co.*, 304 U.S. 263 (1938)).

[9] The question presented by the *Elder* case was "whether an appellate court, reviewing a judgment according public officials qualified immunity from a damages suit charging violation of a federal right, must disregard relevant legal authority not presented to, or considered by, the court of first instance." 510 U.S. at 511-12.

those cited to, or discovered by, the district court." 510 U.S. at 512.

In rejecting the rule the Ninth Circuit adopted in *Elder*, the Court noted that that rule "could have a number of untoward effects." 510 U.S. at 516. First, it could occasion affirmation by appellate courts of incorrect legal results. *Id.* (citing *Elder v. Holloway*, 984 F.2d 991, 998-99 (9th Cir. 1993) (Kozinski, J., dissenting from denial of reh'g en banc)). Second, it could place lawyers representing defendants in a trying situation. *Id.* (citing ABA Model Rule of Professional Conduct 3.3(a) (1989 ed.) ("A lawyer shall not knowingly: . . . (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.")).

The very same untoward effects can be the product of an appellate court's limited review of summary judgment decisions rendered by district courts that fail, for one reason or another, to enforce the controlling law. "Ultimately, enforcement of the laws is what really counts." *Evans v. Jeff D.*, 479 U.S. 717, 743 (1986) (Brennan, J., dissenting).

C. The standard for granting motions for judgment as a matter of law should be used as "a reference point" on appeal to determine if courts granting summary judgment applied the controlling law.

The standard for granting summary judgment found in Rule 56(c) is the standard the Seventh Circuit purported to apply when it affirmed the district court's laches ruling. (App. A. at 10a). That subdivision provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

> affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). This standard, found to "mandate the entry of summary judgment" where there is no legally sufficient evidentiary basis for the non-moving party's claim or defense, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986), makes no reference to "controlling" law.

By contrast, the standard articulated in Rule 50(a)(1) for the granting of a motion for judgment as a matter of law makes specific reference to "the controlling law":

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

This subdivision, added by the 1991 amendment to Rule 50, "articulates the standard for the granting of a motion for judgment as a matter of law." *See* Fed. R. Civ. P. 50 (advisory committee notes, 1991 amendment). "The expressed standard makes clear that action taken under the rule is a performance of the court's duty to assure enforcement of the controlling law . . . ." *Id.* Indeed, "[t]he revision of this subdivision aims to facilitate the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment." *Id.*

The Advisory Committee, at two different points in its Notes, refers to the relationship between Rule 50 and Rule 56:

> The term "judgment as a matter of law" . . . appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules.
>
> Because this standard is also used as a reference point for entry of summary judgment under Rule 56(c), it serves to link the two related provisions.

Fed. R. Civ. P. 50(a) (advisory committee notes, 1991 amendment).

A similar observation was made by this Court in 1986, when it confirmed in its decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), and *Celotex Corporation v. Catrett*, 477 U.S. at 323 (quoting *Anderson*), that the standard for summary judgment found in Rule 56(c) of the Federal Rules of Civil Procedure "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ."

By granting certiorari to resolve the first two questions presented by Hutchinson's petition, the Court can confirm that the standard enunciated in Rule 50(a)(1) not only can, but should, be used as a reference point by the Courts of Appeals in determining whether the trial court has applied the controlling law in granting summary judgment. Use of this standard by the appellate courts should facilitate the exercise of their responsibility, under the Due Process Clause of the Fifth Amendment, to assure the fidelity of lower court judgments to the controlling substantive law, whether state or federal.

II.

DENIAL OF HUTCHINSON'S PETITION FOR REHEARING CONFLICTS WITH DECISIONS OF OTHER CIRCUITS THAT RECOGNIZE A PARTY'S RIGHT TO A PANEL REHEARING UNDER RULE 40 ON A PROPER SHOWING

"A petition for rehearing is designed to bring to the panel's attention points of law or fact that it may have overlooked. Fed. R. App. P. 40(a). The panel is required to consider the contentions in the petition for rehearing if only to reject them." *Missouri v. Jenkins*, 495 U.S. 33, 46 n.14 (1990).

Prior to adoption of Federal Rule of Appellate Procedure 40 in 1967, courts that considered the issue held that petitions for rehearing were addressed to the court's discretion. *See, e.g., General Excavator Co. v. Keystone Driller Co.*, 64 F.2d 39, 40 (6th Cir.), *aff'd*, 290 U.S. 240 (1933). The exercise of that discretion, however, was said to be governed by well-established principles. *See Railway Register Mfg. Co. v. North Hudson Co. R. Co.*, 26 F. 411, 412 (Cir. Ct., D.N.J. 1886); *see also United States v. Burr*, Fed. Cas. No. 14, 692 (C.C. Va. 1807) (a motion addressed to the discretion of a court is "a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles") (Marshall, C.J.); *cf. Koon v. United States*, 518 U.S. 81, 100 (1996) (abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction).

After adoption of Rule 40, federal courts have looked to its terms for guidance. *E.g.:*

> The purpose of petitions for rehearing, by and large, is to ensure that the panel properly considered all relevant information in rendering its decision. A party "abuse[s] the privilege of making such a petition" when it seeks review of

a scope greater than the limited confines of Fed. R. App. P. 40.

Armster v. United States Dist. Court, 806 F.2d 1347, 1356-57 (9th Cir. 1986) (dictum) (citing *Anderson v. Knox*, 300 F.2d 296, 297 (9th Cir. 1962)).

In this case, the review Hutchinson sought in his petition for rehearing was well within the scope of the limited confines of the governing rule. Contentions, summarized on page 14 *supra*, "state[d] with particularity each point of law or fact that [he] believe[d] the court ha[d] overlooked or misapprehended." Fed. R. App. P. 40(a)(2). Each point was supported by the argument contemplated by Rule 40(a)(2). The petition directed the panel's attention to the fact that its decision was in conflict with controlling decisions and failed to address issues that were decisive of the case and had been duly submitted by counsel. All of the judges on the Seventh Circuit panel voted to deny rehearing; no opinion accompanied the denial. Whether other Courts of Appeals summarily deny petitions for rehearing that make the *prima facie* showing prescribed by Rule 40(a)(2) cannot be determined by reviewing reported decisions.

Seven Courts of Appeals recognize a party's right to a panel rehearing under Rule 40 upon a proper showing. *See Long v. District of Columbia*, 469 F.2d 927, 936-37 (D.C. Cir. 1972) (if grounds advanced by appellant in his petition for rehearing had been raised on appeal, but had not been "fully dealt with in our original opinion," rehearing would be proper) (implied); *Pentax Corp. v. Robison*, 135 F.3d 761, 762 (Fed. Cir. 1998) (if theory government identified in its petition for rehearing had been presented on appeal, but had been overlooked or misapprehended by the court, that theory would be addressed on rehearing) (implied); *Meschino v. North American Drager, Inc.*, 841 F.2d 429, 439 (1st Cir. 1988) (petition for rehearing would be entertained upon a showing that the court

had made "a demonstrable mistake") (implied); *Fine v. Bellefonte Underwriters Ins. Co.*, 758 F.2d 50, 51 (2d Cir. 1985) ("[T]he rules of appellate procedure are specifically designed to catch those instances when a panel misapprehends or overlooks some point of law or fact. The rules are meant to assure a party on appeal that its argument has been comprehended and considered by the Court.") (dictum); *Malady v. United States*, 120 F.3d 119, 120 (8th Cir. 1997) (petition for rehearing would be denied where plaintiff "has not shown that we overlooked or misapprehended any point of fact or law at the time we rendered our decision in this case"); *Foster v. MCI Telecommun. Corp.*, 773 F.2d 1116, 1117 (10th Cir. 1985) (defendant's petition for rehearing was granted where it properly points out that court failed to address an issue legitimately raised in the briefs); *Lone Star Steakhouse & Saloon, Inc. v. Longhorn Steaks*, 122 F.3d 1379, 1381 (11th Cir. 1997) ("After reconsidering LSS & S's argument, we are now convinced that the district court procedurally overlooked LSS & S's position. Likewise, it appears that we neglected to fully address the issue.").

A. Favorable resolution of this conflict would assure every party on appeal that its argument has been comprehended and considered by the court, even if not addressed in the court's original opinion.

The fact that a litigant "has an opportunity to speak up" is meaningless unless the decisionmaker "must listen to what he has to say." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). In adjudicative proceedings, due process "requires that the decisionmaker *actually consider* the evidence and argument that a party presents." *de la Llana-Castellon v. Immigration and Nat. Serv.*, 16 F.3d 1093, 1096 (10th Cir. 1994) (citing *Morgan v. United States*, 298 U.S. 468, 481 (1936)) (emphasis added). A cursory review of the Court of Appeals' opinion in this case will reveal that little, if any, of what Hutchinson had to say on *decisive* issues, particularly those dealing with the law of cotenancy and

partition, was actually considered by the panel that decided his appeal. Whether summary denial of the petition for rehearing filed in this case, which made the *prima facie* showing prescribed by Rule 40(a)(2), violated the petitioner's due process rights is a question presented by the circumstances of this case.

Under Rule 40, perceived errors in a panel opinion, such as those Hutchinson identified, are to be brought to the panel's attention through a petition for rehearing. *See Liberty Mutual Ins. Co. v. Elgin Warehouse and Equipment*, 4 F.3d 567, 571 n.6 (8th Cir. 1993). "This procedure balances the concerns of fairness and accuracy with those of finality." *Id.* If these twin aims are to be realized, Rule 40(a)(2) must be construed uniformly and administered in an even-handed manner by every federal judge who sits on a three-judge panel.

By granting certiorari and deciding the third question presented by this petition, the Court can clarify whether words and phrases, drawn from federal decisions[10] and set out below in italics, are implicit in Rule 40(a)(2):

> The petition must state with particularity each *holding that conflicts with a controlling statute*

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[10] *E.g., Railway Register Mfg. Co. v. North Hudson R. Co.*, 26 F. at 412 (courts ordinarily listen to applications for reargument which allege that any question decisive of the case, and duly submitted by counsel, has been overlooked by the court or that the decision is in conflict with an express statute or controlling decision); *Haberman v. Equitable Life Assurance Society of U.S.*, 225 F.2d 837, 838 (5th Cir. 1955) (where incorrect statement of fact in opinion was not part of ratio decidendi, it was not grounds for rehearing); *N.L.R.B. v. Brown & Root, Inc.*, 206 F.2d 73, 74 (8th Cir. 1953) (rehearing would have been proper if petitioner had directed the court's attention to some material matter of law or fact it overlooked in deciding the case and which, had it been given consideration, would probably have brought about a different result).

> *or decision,* point of law *decisive of the case and duly submitted by counsel,* or *material* fact that the petitioner believes the court has overlooked or misapprehended . . . .

Fed. R. App. P. 40(a)(2) (italicized terms added). Clarification of the applicable standard may significantly reduce the number of petitions filed and lighten the work of the Courts of Appeals.

Inter- and intra-circuit uniformity could also be assured by the Court's defining fundamental requirements that should be observed by the Courts of Appeals as they decide approximately 9,000 petitions for rehearing every year.[11] *Cf. Western Pacific Railroad Case,* 345 U.S. 247, 260 (1953) (finding that if 28 U.S.C. § 46(c) was to achieve its purpose, certain fundamental requirements should be observed by the appellate courts, the Court invoked its general supervisory powers and defined those requirements).

Favorable resolution of this conflict among circuits would assure every party to an appeal that its argument has been comprehended and considered by the court, even if it is not addressed in the court's original opinion.

B. The duty of frank and corrective avowal should take first place in the order of judicial business.

Correction of legal error is a task borne largely by panels of the Courts of Appeals. *See Church of Scientology of Cal. v. United States,* 792 F.2d 153, 155 n.1 (D.C. Cir. 1986) (Scalia,

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[11] Government statistics indicate that 9,168 petitions for rehearing were filed in the Courts of Appeals during the year ending September 30, 1997. *See* U.S. Court of Appeals Summary, *Federal Court Management Statistics* (U.S. Dep't of Judiciary, 1997). Figures for the two preceding years were 8,973 and 8,823. *Id.*

J.). That the error to be corrected may be its own should not deter a panel from granting a petition for rehearing if the proper showing is made. "It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations." *Barden v. Northern Pacific R. Co.*, 154 U.S. 288, 322 (1894).

By addressing and deciding the third question presented by this petition, and subsidiary questions fairly included therein, the Court can make it clear that "the duty of frank and corrective avowal takes first place in the order of judicial business," *Romatz v. Romatz*, 355 Mich 81, 94 N.W.2d 432, 433-34 (1959), in the federal courts.

CONCLUSION

For the reasons set forth above, petitioner submits that the Court should allow the writ he seeks and decide the questions presented by this petition.

Respectfully submitted,

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APPENDIX A

[Filed September 10, 1999]

In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 97-2752

THOMAS R. HUTCHINSON, individually and as personal representative of the Estate of Robert W. Hutchinson, deceased, and the Estate of Anne E. Hutchinson, deceased,

Plaintiff-Appellant,

v.

IRA SPANIERMAN, individually and as an agent of Ira Spanierman, Inc.; Spanierman Gallery and Kennedy Galleries, Inc.; IRA SPANIERMAN, INC., a voluntarily dissolved New York corporation; SPANIERMAN GALLERY, an unincorporated association; WILLIAM E. JAGEMAN, individually and as a shareholder of Jageman and McGraw, Inc.; JAGEMAN AND McGRAW, INC., a voluntarily dissolved professional corporation; ROBERT H. HAHN, individually and as a member of Bamberger, Foreman, Oswald, and Hahn; BAMBERGER, FOREMAN, OSWALD AND HAHN, a general partnership; and RITA DEERE, individually and as an agent of Robert H. Hahn and Bamberger, Foreman, Oswald and Hahn,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Evansville Division.
No. EV 90-44-C-M/H - Larry J. McKinney, Judge

Argued April 1, 1999 - Decided September 10, 1999

Before HARLINGTON WOOD, JR., RIPPLE, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge*. This case deals with the rights of certain individuals concerning an art collection that began passing through intestate succession among several family members beginning more than a century ago. Robert Hutchinson originally filed suit for partition of the art collection in 1980 (the "1980 Case") in the District Court for the Southern District of Indiana. The district court dismissed Robert Hutchinson's 1980 Case after the court concluded that it did not have jurisdiction over the defendants who had purchased a majority of the pieces of the art collection and that Robert Hutchinson could not establish an interest in the art collection. The district court also determined that Robert Hutchinson's claims to the art collection under a theory of intestate succession were barred by laches, and, therefore, laches constituted a separate and independent ground for dismissal of the 1980 Case. Robert Hutchinson did not appeal the judgment rendered in the 1980 Case.

Approximately one decade after his father had initially filed suit, Thomas Hutchinson, individually and as personal representative of the estates of his parents, Robert W. Hutchinson and Anne E. Hutchinson, filed suit in the District Court for the Southern District of Indiana accusing the defendants, Ira Spanierman, the Spanierman Gallery, and Robert Hutchinson's attorneys, of conspiring to prevent consideration of his father's action for partition.[1] Thomas Hutchinson also accused Robert Hutchinson's attorneys of negligently failing to press his father's partition case. Before the district court, Thomas Hutchinson moved for summary judgment on the issue of the proper statute of limitations applicable to his father's estate action for the partition of the proceeds of the sale of the art collection. Thomas Hutchinson also asked the district court to consider a separate suit he had filed as a continuation of the 1980 Case. The defendants moved for summary judgment on these claims as well.

The district court granted the defendants' motions for summary judgment after concluding that the doctrine of laches precluded

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[1] Pursuant to an order dated January 5, 1998, this Court dismissed the appeal as to William Jageman, deceased, individually and as a shareholder of Jageman & McGraw, Inc., and Jageman & McGraw, Inc.

Robert Hutchinson from establishing joint ownership of the art collection and, therefore standing to pursue his claims at the time he filed the 1980 Case. The district court also concluded that the 1980 Case was barred by the applicable statute of limitations. For these reasons, the district court concluded that Thomas Hutchinson could not prove the causation or damages elements on the malpractice, collusion, and wrongful interference claims raised in his suit because Robert Hutchinson's cause of action was barred by laches and untimely according to the applicable statute of limitations at the time he filed the case in 1980. In other words, the defendants' alleged conduct did not cause any injuries Robert Hutchinson may have suffered. The district court also denied Thomas Hutchinson's motion to consider his suit a continuation of the 1980 Case and denied Thomas Hutchinson's motion for summary judgment on the issue of the applicable statute of limitations. Because we agree that the doctrine of laches precluded Robert Hutchinson from establishing an ownership interest in the art collection at issue, we affirm the district court's grant of summary judgment in favor of the defendants. We also affirm the district court's evidentiary rulings, its decision to deny Thomas Hutchinson's request for sanctions, and its decision to disqualify Hutchinson's counsel.

I. HISTORY

A. Factual Background

Theodore Robinson was an American Impressionist artist who died intestate in the late nineteenth century. The numerous paintings Theodore Robinson created are referred to as the "Theodore Robinson Collection." Thomas Hutchinson claims that his father had an ownership interest in the collection according to a line of ancestors traceable to Theodore Robinson.

Theodore Robinson's brother and heir, Hamline Robinson, inherited several paintings from his brother's estate. In 1907, Hamline Robinson, like his brother, died intestate. After Hamline Robinson died, his estate was probated in Missouri state court with notice to claimants published in the area newspaper. His heirs were his widow, Florence A. Robinson, and his two daughters, Florence Hutchinson and Ellen Terhune. Each inherited an undivided one-third

interest in Hamline Robinson's estate, which included his brother's art collection.

After her husband's death, Florence Robinson took possession of the art collection and moved in with her daughter, Ellen Terhune. While Florence Robinson lived with Ellen Terhune, they stored the art collection in trunks and displayed it throughout her daughter's home. Florence Robinson died intestate in 1927 leaving her two daughters as her heirs. Although each daughter was entitled to a one-half interest in their mother's estate, Ellen Terhune maintained exclusive possession and control of the art collection throughout her life. During this time, Ellen Terhune permitted a Kansas City art gallery to maintain a number of the paintings for safekeeping and display.

Robert Hutchinson was the son of Florence Hutchinson and the father of the plaintiff in this case, Thomas Hutchinson. Robert Hutchinson claimed that during a visit made by Ellen Terhune to see his mother, she referred to him as a trustee with respect to the paintings and told him that he was entitled to his mother's share of the art collection upon her death, less $400 for a personal loan. In 1945, Florence Hutchinson died intestate, leaving her husband and her son, Robert Hutchinson, as her heirs. Her husband died intestate in 1948, leaving Robert Hutchinson as the sole heir. However, no claim for or accounting of the art collection was made at that time.

Upon the death of her husband, Ellen Terhune moved to Evansville, Indiana, to live with her daughter, Margaret Thompson. They continuously displayed the art collection in her daughter's home and in an art gallery until Ellen Terhune's death. In 1964, Ellen Terhume died intestate. An estate for Ellen Terhune was never opened, and Margaret Thompson was her sole heir. In 1965, Margaret Thompson advised Robert Hutchinson of the death of Ellen Terhune. In 1968, Robert Hutchinson obtained copies of Ellen Terhune's estate papers which identified Ellen Terhune as the sole owner of the entire art collection. Despite learning of this fact, Robert Hutchinson made no claim of ownership to the art collection.

After her mother's death, Margaret Thompson obtained possession of the remainder of the art collection from the art gallery where certain pieces were being displayed and began to negotiate for

the sale of the collection. During this process, Margaret Thompson received a letter from Ira Spanierman soliciting work for an appraisal of the paintings. After an exchange of correspondence with Margaret Thompson, Spanierman performed the appraisal of the paintings in Indiana. Although he originally expressed no interest in purchasing any pieces from the collection, Spanierman did, in fact, purchase the majority of the pieces in the collection from Margaret Thompson at a later date. In 1972, Robert Hutchinson met Spanierman in New York and learned of the purchase. In 1974, Robert Hutchinson became aware that Margaret Thompson pledged the remaining pieces as collateral for a personal loan. Not until 1980, however, did Robert Hutchinson initiate legal action in which he claimed an alleged ownership interest in the art collection.

B. Procedural History

The appeal presently before us involves consideration of three separate lawsuits to differing degrees. In 1980, Robert Hutchinson filed a Complaint for Declaratory Judgment, Partition and Accounting against Margaret and Gordon Thompson in the Southern District of Indiana alleging that he had an ownership interest in the art collection. In this suit Robert Hutchinson requested a declaration of his interest in the art collection, an accounting for all items in the collection and any proceeds derived therefrom, and a partition of the collection. One year later, Robert Hutchinson filed an amended complaint adding Ira Spanierman and the Spanierman Gallery (purchasers of a majority of the art collection) as defendants. The Spanierman defendants filed a motion to dismiss the claims filed against them for lack of personal jurisdiction, for failure to state a claim, and because the claims were time barred. Margaret Thompson filed an answer claiming that Robert Hutchinson's claims were barred by the applicable statute of limitations and by the doctrine of laches. She also asserted that she had obtained absolute title to the art collection by adverse possession. Margaret Thompson also filed a motion for summary judgment arguing that Robert Hutchinson could not prevail under a trust theory and that the applicable statute of limitations and the doctrine of laches barred his claims.

In 1988, the district court granted the Spanierman defendants' motion to dismiss and Margaret Thompson's motion for summary

judgment. With respect to the Spanierman defendants' motion to dismiss the claims against Spanierman and his gallery, the district court concluded that it lacked personal jurisdiction over these defendants. The district court based this conclusion on the finding that Spanierman's contact with the forum state of Indiana, namely one day for the purpose of the appraisal of the art collection, did not rise to a sufficient level to carry jurisdiction with it over the actual sale of the collection which occurred in New York and was unrelated to the appraisal.

As to Margaret Thompson's motion for summary judgment, the district court identified four theories pursuant to which Robert Hutchinson might have alleged an interest in the art collection -- an inheritable interest, an express trust, a resulting trust, and a constructive trust -- and found none to be applicable. The district court found that the doctrine of laches barred Robert Hutchinson's claims under an intestate succession theory and that he did not have an enforceable interest in the art collection under an express, resulting, or constructive trust theory. Alternatively, the district court concluded that the applicable statute of limitations barred Robert Hutchinson's claims under an express and constructive trust and the doctrine of laches separately barred all of his claims. The district court determined that Robert Hutchinson had unreasonably delayed in asserting any interest in the art collection after the occurrence of several events including: the Thompsons' repudiation of any alleged trust in either 1967 or 1968; his viewing Ellen Terhune's estate papers in 1968 in which she was listed as the sole owner of the art collection; and his discovery in 1972 of Margaret Thompson's sale of most of the art collection to Ira Spanierman. The district court also concluded that this delay prejudiced the defendants as a result of faded memories and the death of several important witnesses. Robert Hutchinson did not appeal the final judgment in this case.

In 1990, Robert Hutchinson's son, Thomas Hutchinson, filed related lawsuits based upon alleged misconduct by both Robert Hutchinson's counsel and the defendants in the 1980 Case. In the first case, Case No. EV-90-43-C (the "43 Case"), Thomas Hutchinson asserted claims against Ira Spanierman and his gallery and the estate of Margaret Thompson claiming that these defendants committed fraud on the court in connection with the resolution of the 1980

Case. Thomas Hutchinson claimed that his father's attorneys failed to pursue a valid claim for partition and that their actions interfered with the administration of justice to the extent of causing a fraud on the court. Alternatively, Thomas Hutchinson believed the district court should have abstained from exercising its jurisdiction over the issue of ownership of the art collection out of deference to a state's right to set policy regarding issues of property. Thomas Hutchinson argued that such an abstention should have prohibited the district court from actually ruling on the merits of the partition claim -- even though it did -- and, therefore, any other ruling by the district court in that case should be disregarded. Based on this reasoning, Thomas Hutchinson argued that the 43 Case should be considered a continuation of the 1980 Case under the Indiana Journey's Account Statute. *See* Ind. Code § 34-1-2-8. Accordingly, Thomas Hutchinson believed the relevant aspect of the 1980 Case to be continued by the 43 Case would be the claim for an accounting and partition of the proceeds of the sale of the art collection.

Thomas Hutchinson filed a second action in that same year, Case No. EV-90-44-C (the "44 Case"), asserting claims for legal malpractice against his father's former lawyers, constructive fraud, wrongful interference with attorney-client relationship, collusion, and civil claims under the Racketeer Influenced and Corrupt Organization Act ("RICO"). During the course of the 44 Case, issues pertaining to the disqualification of Thomas Hutchinson's attorneys arose. Robert Hutchinson's former counsel, Robert Hahn and the law firm of Bamberger, Foreman, Oswald, and Hahn (the "Bamberger defendants"), moved to disqualify Thomas Hutchinson's counsel under Indiana's advocate witness rule. The district court granted this motion and disqualified three of Thomas Hutchinson's attorneys. In response to the district court's decision regarding disqualification, Thomas Hutchinson filed a motion for reconsideration, a motion for sanctions against the defendants for having filed the motion to disqualify his counsel, a motion to disqualify counsel, and a motion seeking recusal of the district judge who granted the motion to disqualify. Thomas Hutchinson also filed petitions for writs of mandamus with this Court seeking an order compelling the district court to vacate the disqualification order and an order disqualifying the district judge and vacating orders he had entered in favor of the defendants in each case. Each of the motions and petitions was denied.

In an order dated January 22, 1997, the district court considered a motion for summary judgment filed by the Bamberger defendants in the 44 Case with respect to the claims filed against them. The court also addressed motions filed by Thomas Hutchinson for partial summary judgment in the 44 Case and to have the 43 Case considered a continuation of the case filed in 1980 by Robert Hutchinson under the Indiana Journey's Account Statute.

With respect to the parties' motions for summary judgment, the district court determined that resolution of these motions first required consideration of whether Robert Hutchinson's action seeking partition would have been barred by the statute of limitations or whether laches applied when the case was filed in 1980. The district court noted that if Robert Hutchinson did not file the 1980 Case within the applicable statute of limitations or if laches applied to this case, then the legal malpractice claims against the attorneys and the collusion claims against all the defendants would be moot because these claims each required proof of causation that could not be established if no viable claim for partition existed in the first place.

The district court likewise found Thomas Hutchinson's motion to have the 43 Case considered a continuation of the 1980 Case to turn on these same issues. Thomas Hutchinson asserted that the district court's opinion in the 1980 case should be considered an abatement because it was the result of fraud and not a decision on the merits. Under the Indiana Journey's Account Statute, a case must have been timely filed, but terminated for reasons other than a decision on the merits or negligence in its prosecution to be eligible for continuation. If a new action is brought within five years of the termination of the prior action, the new action may be deemed a continuation of the former action assuming the statutory conditions are met. However, the district court found that the resolution of whether the 1980 Case was filed within the applicable statute of limitations and a determination of whether laches applied necessarily preceded resolution of the applicability of the Indiana Journey's Account Statute.

With respect to the applicability of laches, the district court determined that a joint ownership interest in the disputed property was a necessary precondition to bringing an action for partition and

concluded that the doctrine of laches precluded Robert Hutchinson from establishing such an ownership interest in the art collection at the time of the 1980 Case. Although joint ownership is typically presumed to exist in a partition case, the district court recognized that the very essence of the 1980 Case was the issue of the ownership of the art collection. The district court concluded that the doctrine of laches prevented Robert Hutchinson from demonstrating an ownership interest in the art collection, and, therefore, he lacked standing to pursue his claims.

In the 1980 Case, Robert Hutchinson claimed an ownership interest in the art collection through an intestate interest allegedly derived through his mother and through her uncle, Hamline Robinson. The district court found that Margaret Thompson, one of the defendants in the 1980 Case, claimed ownership through a similar route, but that she also had the added ability to trace actual possession or control of the art collection directly through her mother and her grandmother and to Hamline Robinson. The district court determined that Robert Hutchinson's ability to prove his ownership interest in the art collection was fatally hampered by the fact that he could not present sufficient competent evidence to support his claim of ownership because of the undue and inexcusable delay in pursuing his case. Based on this fact and the court's finding that the defendants were unduly prejudiced by Robert Hutchinson's delay in pursuing his claim, the district court found that the doctrine of laches applied to the 1980 Case. The district court also concluded that the claims pursued in the 1980 Case were barred by the applicable statute of limitations.

The applicability of laches and the determination that the claims in the 1980 Case were time barred would have prevented Robert Hutchinson from establishing the causation and damages aspects of his claims. Accordingly, the district court granted the Bamberger defendants' motion for summary judgment and denied Thomas Hutchinson's motion for summary judgment and his motion to have the 43 Case considered a continuation of the 1980 Case. In response to this decision, the remaining defendants also moved for summary judgment. Thomas Hutchinson filed a motion construed by the district court to be a motion to vacate the order granting summary judgment in favor of the Bamberger defendants. The district court denied Thomas Hutchinson's motion to vacate and granted summary

judgment in favor of the remaining defendants largely based on the reasoning contained in its January 22, 1997, order granting summary judgment in favor of the Bamberger defendants. Thomas Hutchinson now appeals the district court's decisions in the 44 Case.

II. ANALYSIS

A. Standard of Review

Thomas Hutchinson appeals many of the decisions by the district court in this case, including the district court's grant of summary judgment in the 44 Case in favor of the defendants and the district court's evidentiary rulings in that case, the rulings regarding the disqualification of his counsel, and the ruling denying Thomas Hutchinson's request for the imposition of sanctions. We review a district court's grant of summary judgment *de novo*, drawing our own conclusions of law and fact from the record before us. *See Thiele v. Norfolk & Western Ry. Co.*, 68 F.3d 179, 181 (7th Cir. 1995). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. *See Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). "A genuine issue of fact exists only when a reasonable jury could find for the party opposing the motion based on the record as a whole." *Roger v. Yellow Freight Sys., Inc.*, 21 F.3d 146, 149 (7th Cir. 1994).

The remaining issues, including the evidentiary rulings of the district court, the ruling on the disqualification of counsel, and decisions regarding sanctions, are reviewed for an abuse of discretion. *See Old Republic Ins. Co. v. Employers Reinsurance Corp.*, 144 F.3d 1077, 1082 (7th Cir. 1998); *Dunn v. Gull*, 990 F.2d 348, 350 (7th Cir. 1993); *United States v. Defazio*, 899 F.2d 626, 629 (7th Cir. 1990).

B. The Applicability of Laches to the 1980 Case

We agree with the district court's reasoning that if the doctrine of laches applied to the 1980 Case with respect to Robert Hutchinson's ability to establish an ownership interest in the art collection, Thomas Hutchinson's claims would necessarily fail. Without being able to show an ownership interest in the art collection, Robert Hutchinson would have been unable to demonstrate the legally protected interest required to seek partition of the proceeds resulting from the sale of the art collection. In essence, the outcome of the 1980 Case could not be attributed to the defendants' conduct. Consequently, the defendants could not be held liable for any of the alleged injuries in connection with the 1980 Case asserted by Thomas Hutchinson.

It is a fundamental rule of law that one who sleeps on his rights loses them. "[L]aches addresses delay in the pursuit of a right when a party must assert that right in order to benefit from it." *Williams v. Rogier*, 611 N.E.2d 189, 196 (Ind. Ct. App. 1993). The doctrine of laches "bars a party's rights when the party has unreasonably delayed their assertion so as to cause prejudice to the opposing party." *Hawxhurst v. Pettibone Corp.*, 40 F.3d 175, 181 (7th Cir. 1994). In civil matters, the doctrine of laches consists of three elements: (1) inexcusable delay in asserting a right; (2) implied waiver from knowing acquiescence in existing conditions; and (3) circumstances resulting in prejudice to the adverse party. *See In re Geisler*, 614 N.E.2d 939, 940 (Ind. 1993); *see also Paternity of K.H.*, 709 N.E.2d 1033, 1036 (Ind. Ct. App. 1999). However, "[t]he mere passage of time is insufficient; the defendant must also show that the plaintiff's delay was unreasonable and that the defendant was prejudiced as a result." *Habig v. Bruning*, 613 N.E.2d 61, 65 (Ind. Ct. App. 1993).

In the present case, Thomas Hutchinson attempts to use what he regards as the applicable statute of limitations and an alleged absence of inequitable conduct as a gauge for determining whether the doctrine of laches may be applied to the 1980 Case. Thomas Hutchinson asserts that the fifteen year statute of limitations for partition of real property should also apply to the partition of personal property in the form of the art collection and the proceeds derived from its sale. Based on this belief, Thomas Hutchinson contends that Robert Hutch-

inson filed the 1980 Case within the fifteen year statute of limitations allegedly applicable to such actions. Therefore, laches should not have been applied to the claims at issue unless some form of inequitable conduct could be shown. Although the district court recognized that no Indiana case law addressing the applicable statute of limitations exists, the court determined that an action for partition of personal property is governed by the statute of limitations applicable to injury to personal property. At the very least, Thomas Hutchinson claims that the issue of the applicable statute of limitations must be certified to the Indiana Supreme Court for clarification. However, regardless of which statute of limitations should apply in the present case, we conclude that the doctrine of laches bars Robert Hutchinson from establishing any claim he may have had to the art collection. Even though statutes of limitations and laches both implicate whether a particular case has been pursued in a timely manner, "[t]he doctrine of laches may bar a plaintiff's claim even though the applicable statute of limitations has not yet expired if the laches are of such character as to work an equitable estoppel (which contains the additional element of reliance by the defendant)." *Shearer v. Pla-Boy, Inc.*, 538 N.E.2d 247, 254 (Ind. Ct. App. 1989); *see also Shafer v. Lambie*, 667 N.E.2d 226, 231 (Ind. Ct. App. 1996). The record contains evidence of reliance upon the conduct of Robert and Florence Hutchinson by the defendants in this case that permits the application of laches regardless of whether the 1980 Case was filed within the applicable statute of limitations.

At the outset of our examination of the issue of the application of laches, we note that we agree with the assessment of the district court that the existence of joint ownership in the art collection was in dispute at the time Robert Hutchinson filed his claim in 1980, despite the claim of the alleged existence of a co-tenancy in the art collection created by intestate succession at some time in the past. The very wording of the complaint filed by Robert Hutchinson in the 1980 Case requested that the court "determine, declare and decree the interest, right and title of the parties hereto in the Theodore Robinson Collection." To pursue successfully the partition of a particular piece of property before a court, the individual seeking partition must be able to show an ownership interest in the property. Without showing such an interest, the person seeking partition is nothing more than an outsider looking to carve out a piece of property that otherwise does

not belong to him. While the district court cited cases dealing with the partition of real property to support this proposition, *see Burford v. Burford*, 396 N.E.2d 394, 397 (Ind. Ct. App. 1979); *Hurwich v. Zoss*, 353 N.E.2d 549, 551 (Ind. Ct. App. 1976); *Helvey v. O'Neill*, 288 N.E.2d 553, 557 (Ind. Ct. App. 1972), we see no reason why such a principle is not applicable to requests for partition of personal property as well, *see Willett v. Clark*, 542 N.E.2d 1354, 1357 (Ind. Ct. App. 1989) ("[W]hile we are unaware of any Indiana appellate decisions sanctioning partition of personal property, the general rule is that a co-tenant of personal property has a right to have it partitioned.").

As the plaintiff in the 1980 Case, Robert Hutchinson bore the burden of proving that he had an ownership interest in the art collection. The district court succinctly recognized that "[t]he fact that he sought a declaration from the Court as to ownership of the Collection, rather than merely allowing the defendants to raised dit as an affirmative defense, indicates there was some doubt about that issue." In the 1980 Case, Robert Hutchinson alleged that his ownership interest in the art collection stemmed from intestate succession derived through his mother, Florence Hutchinson, and through her father, Hamline Robinson. Thomas Hutchinson also relies on this reasoning in his effort to establish his father's alleged ownership interest in the art collection. Furthermore, Thomas Hutchinson asserts that the defendants in the 1980 Case should not have been permitted to deny Robert Hutchinson's ownership interest in the art collection because the art collection constitutes an unadministered asset from the estate of Florence Robinson, which his father held in constructive possession as a co-tenant.

Thomas Hutchinson relies on the case of *Daugherty v. Breeding*, 553 S.W.2d 299 (Ky. Ct. App. 1977), and the rules of intestate succession in Missouri and California to argue that the art collection was an unadministered asset from the estates of Hamline and Florence Robinson. Thomas Hutchinson claims that Florence Robinson and, then, his father maintained constructive possession of the art collection as co-tenants in the collection with Ellen Terhune and Margaret Thompson. *Daugherty* involved a woman bringing suit against the estate of her brother in which she claimed an interest in a stagecoach owned by their father. Their mother (having been pre-

ceded in death by her husband) left each an equal interest in her estate, which included the stagecoach. During his lifetime, the brother cared for and maintained the stagecoach in his garage for display to the public. The court rejected the argument that the possession of the stagecoach by the brother was adverse to the interests of his sister and concluded that the stagecoach was an unadministered asset from the estate of their mother in which the brother and sister were co-tenants.

Like the art collection at issue in the 1980 Case, the personalty at issue in *Daugherty* passed through intestate succession and had not been administered as part of an estate. However, at this point, the similarity between the two cases ends. Language in the *Daugherty* opinion suggests that the outcome would have been different if the court had been faced with facts resembling those presently before this court. The court stated that:

> This is not a case in which heirs have informally divided family heirlooms among themselves without formal administration or distribution by the personal representative. If it were shown that each heir possessed items of unadministered personalty for a significant period of time, there would be a strong presumption that the heirs had made a division of the assets and that each heir held items in his or her own right rather than as cotenants.

Daugherty, 553 S.W.2d at 303. Consistent with the reasoning expressed in *Daugherty*, the district court recognized in the present case that "[a] logical inference to draw from [the behavior of the family members] is that some consensus had been reached as to who should have the Collection."

Ultimately, Robert Hutchinson's ability to establish an ownership interest in the art collection was dependent upon his ability to show an ownership right in the property acquired by descent. It is his ability to make such a showing that was barred by laches in the 1980 Case. For Robert Hutchinson to have any ownership interest in the art collection, he would have had to have received this interest from his mother, Florence Hutchinson. However, his mother never possessed

any pieces of the art collection and failed to press any claim of ownership at any time during her life. There is no evidence demonstrating that any interest in the art collection passed to her son upon her death. Moreover, evidence to the contrary did in fact exist. Estate papers for Ellen Terhune, of which Robert Hutchinson had knowledge in 1968, showed Ellen Terhune as the sole owner of the art collection. Despite learning of this fact, Robert Hutchinson chose to forgo asserting any interest in the art collection at the time of his mother's death or at the time he learned that Ellen Terhune was considered to be the sole owner of the art collection.

The conduct of both Robert and Florence Hutchinson warranted the application of the doctrine of laches to preclude Robert Hutchinson from establishing an ownership interest in the 1980 Case. As stated, the doctrine of laches consists of three elements: (1) inexcusable delay in asserting a right; (2) implied waiver of the right from a knowing acquiescence in existing conditions; and (3) circumstances resulting in prejudice to the adverse party. *See In re Geisler*, 614 N.E.2d at 940. If the doctrine of laches is to be applied prior to the expiration of the applicable statute of limitations, reliance by the defendant must also be shown. *See Shearer*, 538 N.E.2d at 254. When the facts of this case and the 1980 Case are considered, it is clear that the elements required for the application of the doctrine of laches existed at the time Robert Hutchinson filed the 1980 Case.

There is no doubt that Robert Hutchinson delayed in pressing his claim for partition in the art collection. Both he and his mother had knowledge that the art collection remained in the possession and exclusive control of other family members -- namely Ellen Terhune and her daughter Margaret Thompson -- throughout their lives. Indeed, Robert Hutchinson testified in his deposition that he became aware of his alleged interest in 1945 and 1952 after conversations with Ellen Terhune. Despite this fact, Robert Hutchinson made no demand on Margaret Thompson with respect to his alleged interest until he allegedly spoke with Margaret Thompson about his interest in the late 1960s. After this alleged demand on his interest, Robert Hutchinson made no further attempt to claim his interest until approximately six years later. However, even after again allegedly contacting Margaret Thompson about his interest, Robert Hutchinson made no inquiry until filing his suit in 1980.

Because Robert Hutchinson is also charged with the delay of his mother in asserting any claim she may have had, decades passed before any legal action was taken with respect to the art collection. Both Robert and Florence Hutchinson were armed with the knowledge that other family members possessed the art collection, yet they did nothing to protect their alleged ownership interests. Rather, they sat idly by and delayed in attempting to preserve any claimed interest. When viewed in this light, the facts demonstrate a tremendous lapse in time before Robert Hutchinson filed his claim in 1980. No credible excuse for this delay has been offered to this Court. Absent some compelling explanation, a delay of this sort is without question, inexcusable given the opportunities Robert and Florence Hutchinson had to assert their alleged ownership interest.

The conduct of both Robert Hutchinson and his mother, Florence Hutchinson, not only reflects an inexcusable delay in pressing their claim, but also constitutes a conscious indifference with respect to asserting an interest in the art collection and bringing a cause of action for partition of the art collection or the proceeds derived from its sale. Their acquiescence with respect to the existing conditions was manifested in their utter disregard for ensuring the preservation of their alleged ownership interest in the art collection as it was possessed and passed from generation to generation among other individuals. First, there is no evidence in any record that Florence Hutchinson ever questioned either her sister's possession or her perceived ownership of the art collection. Second, Robert Hutchinson knew of Ellen Terhune's possession of the art collection and obtained her estate papers, which identified her as the sole owner of the art collection, after her death in 1964. And, Ellen Terhune's family repudiated Robert Hutchinson's claim that the art collection was being held in some sort of trust. It would seem logical that a reasonable person believing they shared an ownership interest in the property would have pressed the claim at this point or soon thereafter. Certainly, such a claim could have been brought when Robert Hutchinson learned in 1972 that Margaret Thompson sold the vast majority of the collection to Ira Spanierman in 1966 and used the remaining pieces to secure a personal loan from a bank. The listing of Ellen Terhune as the sole owner of the art collection in her estate papers and Margaret Thompson's sale of the pieces from the collection and use of the pieces as security for a personal loan were completely adverse to and

constituted a definitive denial of any alleged ownership interest Robert Hutchinson may have had in the collection. Rather than pursing his alleged interest, Robert Hutchinson chose to forgo the assertion of any ownership in the collection in the face of all this information, and, instead, sat on his alleged claim until 1980. The district court accurately summed up the Hutchinsons' indifference to their rights in the art collection by stating "both [Robert and Florence Hutchinson] knew the Collection was being possessed and controlled exclusively by [Ellen Terhune and Margaret Thompson], a condition in which they acquiesced either happily, or without obtaining some writing that would indicate they still maintained an interest in the artwork."

We also have no difficulty in concluding that Robert Hutchinson's inexcusable delay in asserting his alleged interest in the art collection and his acquiescence with respect to the status of the collection resulted in prejudice to the defendants in the 1980 Case. By the time Robert Hutchinson got around to asserting his alleged interest in the art collection, those in the best position to shed light on the issues of ownership were deceased. Indeed, the district court determined in the 1980 Case that evidence had been lost, memories had faded, and witnesses had disappeared with respect to events that had occurred fifteen years earlier. The defendants in the 1980 Case would certainly have been prejudiced if forced to defend their interest in the art collection at such a late date. "Successful invocation of the doctrine of laches has included proof that available witnesses did not have a distinct recollection of the details of the case or that they had no access to records which would disclose the same." *In re Seigel*, 708 N.E.2d 869, 871 (Ind. 1999).

The district court also concluded in the present case that laches applied regardless of whether the applicable statute of limitations had expired. The district court based this conclusion on its finding that the defendants in the 1980 Case relied on the acquiescence of Robert and Florence Hutchinson in matters involving the art collection. Margaret Thompson sold the majority of pieces composing the collection to Ira Spanierman and the Spanierman Gallery in 1966 and encumbered the remainder of the unsold pieces as security for a personal loan. In addition to the fact that Thomas Hutchinson does not specifically challenge this finding on appeal, we independently

conclude that these actions satisfy the reliance aspect required to find that laches applies before the expiration of the applicable statute of limitations. The decision to sell the majority of the art collection and to use the remaining pieces as collateral certainly reflects a reliance on the fact that the art collection was not otherwise encumbered by a separate interest. Had Robert Hutchinson pressed his claim while nearly the entire collection was in the possession of Margaret Thompson or shortly after the sale of the collection, it is likely that the defendants in the 1980 Case would have had at least a portion of the proceeds still available so as to permit them to make reasonable reparations to Robert Hutchinson if his claim had been properly established. Because Robert Hutchinson failed to pursue his claims in a timely manner, it would be inequitable to permit Robert Hutchinson to proceed with his claims, for "a person who tacitly encourages an act to be done cannot afterward exercise his legal right in opposition to such consent, where his conduct or acts of encouragement induced the other party to change his position so that he will be prejudiced by the assertion of such claim." *Scherer v. Scherer*, 405 N.E.2d 40, 47-48 (Ind. Ct. App. 1980) (citation omitted); *see also Crousore v. Allee*, 82 N.E.2d 276, 566 (Ind. Ct. App. 1948) (citation omitted) ("[W]here during the unnecessary delay interests of innocent third persons have attached, or the party against whom relief is asked has, in reliance upon the existing situation, so changed his position that if existing conditions were removed, he would suffer injury, the delay will be characterized as laches.").

We find that the doctrine of laches prevented Robert Hutchinson from establishing an ownership interest in the art collection in the 1980 Case. For this reason, Thomas Hutchinson is unable to attribute the failure of the 1980 Case to the conduct of the defendants. Thomas Hutchinson's claims necessarily fail because of his inability to prove causation and damages with respect to those claims. We conclude that the district court's grant of summary judgment in favor of defendants was proper.

C. Thomas Hutchinson's Remaining Claims

Thomas Hutchinson contends that the district court erred by failing to take judicial notice of the "offer of proof" he filed in the 43 Case, by disqualifying his counsel, and in refusing to grant sanctions

against the defendants. A district court's decision regarding the admission of evidence is reviewed for an abuse of discretion. *See Old Republic Ins. Co.*, 144 F.3d at 1082. Thomas Hutchinson argues that the district court deprived him of procedural due process by failing to consider "documentary evidence found in the two-volume offer of proof . . . filed in [the 43 Case]." This offer of proof concerned the alleged motive of the defendants for committing fraud on the court in the 43 Case. The district court concluded that it would be inappropriate to consider the offer of proof in the 44 Case because it was prepared by Hutchinson's attorney who had been disqualified by the district court. The district court believed consideration of the offer of proof would violate the spirit of the disqualification order. In his brief, Thomas Hutchinson fails to address how this decision constituted an abuse of discretion and fails to identify evidence in his offer of proof that should have been considered, the impact of this evidence on the outcome of the case, or even why the district court should have taken judicial notice of this offer of proof. Accordingly, we find his argument on this issue to be without merit.

Thomas Hutchinson also argues that the district court's conclusion regarding the disqualification of his counsel, Joan Godlove, and the district court's failure to sanction the defendants for filing the motion to disqualify were erroneous. These conclusions are likewise reviewed under an abuse of discretion standard. *See Dunn*, 990 F.2d at 350; *Defazio*, 899 F.2d at 629. We find no abuse of discretion with respect to either of the conclusions reached by the district court.

The district court found that Godlove was a necessary witness under Rule 3.7 of the Indiana Rules of Professional Conduct. This rule provides that a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness. The commentary to Rule 3.7 also provides that the opposing party has a proper objection when the combination of roles may prejudice that party's rights in the litigation. In determining whether to disqualify counsel, a court is directed by Rule 3.7 to conduct a balancing between the interests of the client and those interests of the opposing party.

In the present case, Godlove informed the district court that it would be necessary for Thomas Hutchinson to obtain other counsel to represent him with respect to Count I of his complaint against the

Bamberger defendants, which alleged that the Bamberger defendants committed acts of legal malpractice in the 1980 Case. Consistent with this notification, attorney Robert Abdalian filed a Notice of Intent for Leave to Appear Pro Hac Vice as counsel for Thomas Hutchinson as to Counts I, II, and IV. The district court found that these two events demonstrated that Godlove realized she was likely to become a witness with respect to Count I of the complaint. The district court also found that Godlove should be disqualified as to Count V as well. This count dealt with a civil RICO claim under 18 U.S.C. § 1961, alleging that certain defendants engaged in a pattern of racketeering activity beginning in 1966 and continuing through 1990. The district court noted that a part of the pattern of the alleged activities specifically included a telephone call to Hutchinson's attorneys in April 1990 in which Godlove participated. The district court also determined that the substance of that telephone conversation was in dispute and that it was reasonably likely that Godlove would be called to testify regarding that call. The district court concluded that these counts could not be severed from the remainder of the complaint and, therefore, Godlove would have to be disqualified as to all counts of the complaint.

The district court then balanced these determinations against the prejudice that disqualification would cause Thomas Hutchinson. The district court found that Thomas Hutchinson would not be unduly prejudiced as a result of Godlove's disqualification. The district court also recognized that "[t]he potential for Godlove to testify is apparent at an early state of the litigation, and plaintiff has brought forward no evidence showing that Godlove possesses unique expertise or other 'distinctive value' in the types of claims at issue." Godlove's lengthy relationship with the case and her familiarity with the facts underlying Hutchinson's interest in the art collection further increased the probability that she would be called as a witness in the case. Given the relative absence of prejudice to Thomas Hutchinson resulting from the disqualification of Godlove and the balancing undertaken by the district court, we cannot conclude that the district court abused its discretion in disqualifying Godlove. Likewise, we find no merit in Thomas Hutchinson's claim that the district court abused its discretion in failing to sanction the defendants for filing the motion to disqualify.

III. CONCLUSION

Based upon our determination that the doctrine of laches applied in the 1980 Case, we conclude that the district court's grant of summary judgment in favor of the defendants was appropriate. We also conclude that the district court did not abuse its discretion with respect to the evidentiary issues raised by Thomas Hutchinson or with respect to its decision granting the defendants' motion to disqualify counsel and denying Thomas Hutchinson's motion for sanctions. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

[Filed January 22, 1997]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

Cause No. EV 90-44-C M/H

THOMAS R. HUTCHINSON, Individually and as Personal Representative of the Estate of Robert W. Hutchinson, deceased ANNE E. HUTCHINSON,

Plaintiffs,

v.

IRA SPANIERMAN, et al.,

Defendants.

(Related Case)
Cause No. EV 90-43-C M/H

THOMAS R. HUTCHINSON, Individually and as Personal Representative of the Estate of Robert W. Hutchinson, deceased

Plaintiffs,

v.

EARL H. RICHERT, Personal Representative of the Estate of Gordon Sterling Thompson, et al.,

Defendants.

ORDER

I. INTRODUCTION

This cause is before the Court on motions for summary judgment and partial summary judgment, both of which relate to the issue of whether an action seeking partition could have been timely brought in 1980 by the plaintiffs' father, Robert W. Hutchinson ("Robert"), against the estate of Margaret L. and Gordon S. Thompson (the "Thompsons"). Plaintiffs, Thomas R. Hutchinson, Individually and as Personal Representative of the Estate of Robert W. Hutchinson and Anne E. Hutchinson (collectively "Hutchinsons"), moved for partial summary judgment only on the issue of the proper statute of limitations to apply to their father's "estate action for the partition of objects" in the possession of the Thompsons on May 12 1980. Plfs' Mot. for Part. Sum. J. at 1.

Defendants, Robert H. Hahn, the law firm of Bamberger, Foreman, Oswald and Hahn, and Rita Deere (collectively the "Bamberger Defendants"), however, have moved for summary judgment on the claims against them, which are set forth in three counts of a five-count complaint. The Hutchinsons have accused both Ira Spanierman, Ira Spanierman, Inc. and the Spanierman Gallery (collectively "Spanierman") and their father's former counsel, Robert H. Hahn ("Hahn"), of conspiring to prevent the Court from considering Robert's legitimate action for partition. Allegedly, this was accomplished by diverting the Court's attention instead to a trust theory of recovery. Hahn is also accused of negligently failing to press the partition claim.

Resolution of both of these motions requires the Court to determine whether the action seeking partition would have been barred by the statute of limitations or laches in 1980. If it would have, then the malpractice claims against the attorneys and collusion claims against all defendants would be mooted.

Those claims would require proof that the alleged collusion or negligence caused the Hutchinsons the harm complained of. If Robert had no viable claim for partition in the first place, then his losing the prior suit cannot be attributed to defendants' conduct. Consequently, the claims of collusion and negligence would suffer from a scarcity of proof on the elements of causation and damages.

In a related case, a recent filing by the Hutchinsons asks the Court to deem that action, captioned Hutchinson v. Thompson, et al., Cause No. EV 90-43 M/H ("EV 90-43"), a continuation of the 1980 case, encaptioned Hutchinson v. Day, Cause No. EV 80-104-C ("EV 80-104"). To that end, they invoke the Indiana Journey's Account Statute. See Ind. Code § 34-1-2-8. The central theory underlying the Hutchinsons' claims in EV 90-43 is that not only was a valid claim for partition not pursued by Hahn or his firm, their actions interfered with the administration of justice to the extent of causing a fraud on the court. To remedy the alleged injustice, the Hutchinsons suggest that the Court find that the earlier action for partition was viable, and that its resolution was not on the merits, rather it should be considered an abatement.

They note that an alternative ground for the Court's decision in the 1980 case was that the Court should abstain from exercising its jurisdiction over the issue of ownership of the Collection, out of deference to a state's right to set policy over issues of property. The Hutchinsons argue that such abstention prohibited the Court from ruling on the merits of the partition claim (even though it did), and that any such ruling should be disregarded. Consequently, the relevant aspect of the 1980 case to be continued by the 1990 case would be the claim for partition.

To be considered eligible for continuation under the Journey's Account statute a case must have been timely

brought, but terminated for reasons other than a decision on the merits or negligence in its prosecution. Id.; Vesolowski v. Repay, 520 N.E.2d 433, 435 (Ind. 1988). If a new action is brought within five years of the termination of the prior action, it may be deemed a continuation of the former action if the statutory conditions are met.[1] Vesolowski, 520 N.E.2d at 435. Thus, the applicable statute of limitations for partition of personal property is relevant to a resolution of this motion as well.

In light of the relevance of the timeliness inquiry to the pending summary judgment motions in EV 90-44 and the Journey's Account motion in EV 90-43, the decision on this issue will apply to both of the related cases. To reach a decision, the Court must determine whether the action for partition in the 1980 case was governed by Indiana's two-year statute of limitations for actions involving injury to personal property or conversion, its six-year limitation for recovery of personal property, or its fifteen-year "catch-all" statute that has been applied to an action for partition of real property. See I.C. §§ 34-1-2-2(1), 2-1, 2-3; see also Waymire v. Waymire, 43 N.E. 267, 268 (Ind. 1896). The parties agree that no Indiana case has directly decided which statute of limitations should apply to an action for partition of personal property.

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[1] One of four conditions must be met to invoke the saving power of the Journey's Account Statute:

1. the plaintiff fails from any cause except negligence in the prosecution;

2. the action abated;

3. the action is defeated by the death of a party; or

4. judgment is arrested or reversed on appeal.

Vesolowski, 520 N.E.2d at 435.

II. DISCUSSION

A. LACHES

The need to solve the timeliness problem may be precluded by the resolution of an issue that precedes a partition action. In fact, a precondition to bringing an action for partition is joint ownership of the property.[2] See Hurwich v. Zoss, 353 N.E.2d 549, 552 (Ind.App. 1976); Helvey v. O'Neill, 288 N.E.2d 553, 559 (Ind.App. 1972). Unless the parties dispute ownership or title, it will not ordinarily be decided by a partition ruling.[3] Instead, that precondition is presumed to exist. See Helvey, 288 N.E.2d at 557. Here, not only is such ownership contested, but the issue was raised by the original plaintiff in the 1980 complaint, which asked the court to "determine, declare, and decree the interest, right and title of the parties hereto in the Theodore Robinson Collection."[4] Plfs' Mot. For Part. Sum. J.,

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[2] One suing a tenant in common for rents and profits must prove the tenancy in common first. Geisendorff v. Cobbs, 94 N.E. 236 (Ind. App. 1911). In a quiet title action, if the court finds the defendant to have no interest in the realty, and his claim is therefore adverse, he is not entitled to have the realty partitioned. Dowell v. Jolly, 159 N.E.2d 590, 592 (Ind.App. 1959).

[3] A decree in partition is not res judicata as to the title, if the pleadings did not raise and settle the issue of ownership. Stephenson v. Boody, 38 N.E. 331 (Ind. 1894). In a proceeding for partition, the question of title may be put in issue and determined, and in a suit for partition, the defendant may properly put title at issue. McMahan v. Newcomer, 82 Ind. 565 (1882).

[4] In addition to a declaration of property rights, Hutchinson also sought an accounting for proceeds from disposition or sale of the property, and partition of the Theodore Robinson Collection (hereafter "Collection"), as well as any other equitable and proper relief. Plf's Ex. E, Appendix to Brief in Sup. of Plfs' Mot. For Part. Sum. J.

Ex. 3, Compl. For Decl. J., Accounting and Partition at 2.

The effect of that request is to add a different dimension to the timeliness inquiry. If a party cannot demonstrate a right to possess the property, he or she has no standing to sue the person actually in possession. See Burford v. Burford, 396 N.E.2d 394, 397 (Ind. App. 1979); Hurwich, 353 N.E.2d at 551; Helvey, 288 N.E.2d at 557. Without standing, a party is prohibited from bringing an action regardless of whether it was timely. See Dowell v. Jolly, 159 N.E.2d 590, 592 (Ind. App. 1959). In other words, the Court need not address the timeliness issue if there was no standing. As the plaintiff in the original action, Robert had the burden of establishing that he had standing to sue for partition, which meant he had the burden of proving he had possessory rights in the Collection. The fact that he sought a declaration from the Court as to ownership of the Collection, rather than merely allowing the defendants to raise it as an affirmative defense, indicates there was some doubt about that issue.

In an amended complaint filed on April 17, 1981, Hutchinson alleged that his ownership interest and that of defendant Margaret Thompson ("Margaret") is claimed from a common ancestor, Hamline R. Robinson, their grandfather and Theodore Robinson's brother. Plfs' Appendix, Exh. 5, Amended Compl. ¶ 9. Hutchinson states, and defendant Thompson admits in her answer, that she disposed of some one hundred and forty-one items from the Collection to Ira Spanierman and that she claims sole ownership of the remaining items and has refused to partition those items with Hutchinson or to account to him for the

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(hereinafter "Appendix"). In their answer, the defendants Margaret L. Thompson and Gordon S. Thompson (collectively the "Thompsons") specifically denied Hutchinson's ownership of an undivided one-half interest in the Collection, and also raised certain affirmative defenses. Appendix, Exh. 4.

profits from the disposition of the other items. Plfs' Appendix, Exh. 6. Defendants raise the same affirmative defenses to the 1990 action as with the original complaint.[5]

Robert claimed ownership through an intestate interest allegedly derived through his mother from her uncle, Hamline Robinson. Margaret claims ownership by a similar route, but with the added ability to trace actual possession or control of the Collection through her mother and grandmother back to Hamline. According to the Hutchinsons, the fact that both they and Thompson claim to have acquired their interests from a "common source" means that Thompson cannot deny their title. See Millis v. Roof, 23 N.E. 255, 256 (Ind. 1890). In Millis, the Indiana Supreme Court noted that when two or more persons "claim title to real estate under the same grantor" neither will be allowed to deny the validity of the other's title from the grantor. Id.

The context for that statement was that an interest in certain real property was conveyed by warranty deed to a direct predecessor in interest to the four cotenants involved in the suit. That predecessor created the cotenancies. One of the original cotenants conveyed his interest to the defendant, and the other three cotenants sued him to quiet title. The plaintiff cotenants attempted to force the defendant cotenant to prove the validity

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[5] The Thompsons assert the affirmative defenses of laches, of adverse possession, and of running of the statute of limitations. Of the three, the one most likely to bar the action for partition is laches. Hutchinson's "right" to the Collection is in the nature of an intestate share to personal property. Partition is an equitable remedy, and a court has exclusive jurisdiction over an action to obtain such a remedy. See Robinson v. Dickey, 42 N.E. 679, 680 (Ind. 1896). To successfully maintain an action for partition a claimant must have both title and possession or the right to possession of the property. See Hurwich v. Zoss, 353 N.E.2d 549 (Ind. Ct. App. 1976); Schori v. Stephens, 62 Ind. 441, 448 (Ind. 1878).

of his title by challenging the conveyances that preceded the common grant creating the cotenancies. Understanding this context clarifies the court's statement that the case "falls within the infallible rule" that when two or more persons claim title under the same grantor and through the same deed, neither will be permitted to deny the validity of the other's title. Id.

The Hutchinsons' interpretation of this proposition does not comport with its meaning in context. They claim joint ownership based on the fact that the personal property, at one time, was in the hands of a common ancestor. According to the Hutchinsons, Thompson is estopped from denying their title because she likewise claims from the same source. The Millis court, however, was asked to consider the validity of a cotenants' title in relation to conveyances that preceded the conveyance from the common grantor. Millis, 23 N.E. at 256.

For the same rule to apply here, the Thompsons would have had to be challenging the validity of the title Hamline had when he died. This is not what they argued. Instead they maintained that Robert had not inherited any interest in the property through his mother and grandfather. See Hutchinson v. Day, No. EV 80-104, Judgment Entry at 10. For Robert to have had a possessory right in the property he would have acquired it by descent, through successive estates. Because neither Robert nor his mother ever possessed any part of the Collection and no estate papers exist to demonstrate the descent of an interest from Hamline to Robert's mother, or from her to Robert, some other evidence of Robert's alleged ownership rights is needed. The path to the common ancestor is too indistinct.

In fact, Hutchinson's possessory interest in the property may have been eliminated before his grandmother Florence Hutchinson ("Fonnie"), died. Based on the undisputed facts, Fonnie never seemed to have possessed any of the Collection, nor did she assert any claim to it. Instead, she sat on her rights

for thirty-eight years after her father died intestate in 1907, and eighteen years from the time her mother died intestate in 1927, till the time she died in 1945. A natural time for her to have inquired about her rights to the paintings would have been when her father, Hamline, or her mother, Florence, died in possession of the Collection.

When Hamline died, the evidence indicates that the Collection remained in the home he had shared with his wife, Florence. When Florence Robinson died, she had been living with her other daughter, Ellen Terhune ("Nellie"), and the collection was housed in the home they shared. Upon Florence's death, the collection remained in Nellie's possession. Rather than seek her share of the Collection, Fonnie appeared content to allow her sister to enjoy exclusive possession of the paintings and other memorabilia.

A logical inference to draw from this behavior is that some consensus had been reached as to who should have the Collection.[6] She apparently passed this acceptance of the status quo on to her son, Robert, who likewise asserted no right of possession to the artwork at the time Fonnie died intestate in 1945. Her death would have been a natural time for Robert to inquire about his interest in the Collection. Moreover, if Fonnie were in fact a joint owner of the Collection, it would have and should have passed through her estate to her sole surviving heir,

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[6] Such an inference would be reasonable in light of the fact that Nellie had housed and cared for their mother all those years. Alternatively, it could have been that Fonnie just did not want any of the paintings. Or the two sisters may have just avoided settling the issue of ownership of the Collection, in which case the third generation of alleged heirs is in no better position to settle it. In fact, no lawyer or court is capable of accurately tracing ownership interests in personal property allegedly passed through intestate succession without the benefit of any writing and after the death of all competent witnesses.

Robert. No evidence has been presented that an undivided one-half interest in the Collection ever passed through Fonnie's estate to Robert. On that basis alone the Court would be content to find that Robert had no possessory interest that would enable him to bring an action for partition.

But there is more. Robert's alleged interest was not reflected in the estate of Fonnie's sister, Nellie, who died in possession of the entire Collection. When Nellie died, in 1964, Robert made no claims against her estate to preserve his alleged interest in the Collection.[7] Thus, nearly twenty years after Robert allegedly inherited an undivided one-half interest in the Collection from his mother, he still declined to exercise his rights. It was only when the art world began to take notice of the work of Theodore Robinson that Robert began to explore the whereabouts of the Collection. Unfortunately for Robert, that exploration occurred after the deaths of any family members who could explain the curious way in which the Collection had been handled since Hamline's death.

It also occurred more than forty years after Hamline's widow, and Fonnie and Nellie's mother, Florence died, leaving Nellie, and subsequently her daughter, enjoying exclusive possession and control of the Collection. Naturally, Nellie and Margaret appeared to rely on the absence of any competing claims to the art work. Robert's delay is inexcusable. A minimum of three estates could have been opened and used to establish the successive ownership interests of the parties[8] (Florence

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[7] The Court notes that in the 1988 order concluding the Hutchinson v. Day case of 1980, Judge Brooks found that Robert had been informed in 1968 that Nellie's estate papers only listed her as the owner of the Collection. Plfs' Exh. 25 at 12.

[8] Indiana's probate code affords a procedure to accomplish this. "At any time during the administration of a decedent's estate,

Robinson, Fonnie Hutchinson and Nellie Terhune), and by not taking advantage of this procedure, both Fonnie and Robert impliedly waived their ownership rights in favor of Nellie and her daughter.

Moreover, any effort at this point to attempt to discover or enforce any inter- or intrafamily agreements with respect to the Collection would be nearly impossible. Those who could enlighten the Court have died, and others who might be able to assist would be testifying about events that occurred a long time ago, and may have only vague recollections. To require Margaret's estate to defend her right to sole possession and ownership of the Collection after all these other opportunities have passed, and all the eyewitnesses have died, forgotten or become incompetent, would be unduly prejudicial. For all these reasons, this Court finds that Robert, who had the burden of proving his ownership interest in the Collection, failed to do so.

Robert's ability to prove his ownership interest was hampered by the fact that he could not present sufficient competent evidence in support of his claim because he sat on his rights too long and was barred by the doctrine of laches. To counter the evidence of exclusive possession and control of the Collection by the Terhunes and Thompsons, Robert would have needed evidence of some agreement between his mother and himself and the Terhunes and Thompsons regarding that arrangement and acknowledging their equal right to possess the property. None was presented. His effort to demonstrate the existence of a trust during the 1980 action failed. Another problem he could not counter was the fact that Nellie's probated estate listed the Collection as hers alone and passed it to Margaret. Robert could not adequately explain why he did not

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the personal representative or any interested person may petition the court to determine the heirs of said decedent and their respective interests in the estate or any part thereof." Ind. Code § 29-1-6-5(a).

present a claim against Nellie's estate for a share of the Collection, and his alleged interest in the Collection would have been extinguished no later than at the closing of her estate.

Laches is a doctrine that exists to protect parties from having to defend stale claims. To support a finding of laches, the Court must find the following:

1. plaintiff's inexcusable dely in bringing the action;

2. plaintiff's implied waiver based on a knowing acquiescence in existing conditions; and

3. prejudice to the defendant because of the delay.

Habig v. Bruning, 613 N.E.2d 61, 65 (Ind. Ct. App. 1993); In re Estate of Gerke, 580 N.E.2d 972, 976 (Ind. Ct. App. 1991). Laches may bar a claim even if the statute of limitations has not run, if reliance is shown. See Shafer v. Lambie, 667 N.E.2d 226, 231 (Ind. Ct. App. 1996). A defendant is found to have relied if he or she has "materially altered" his or her position due to the delay in bringing a claim. In re Estate of Gerke, 580 N.E.2d at 977. The excusable delay requirement responds to one of the goals of this doctrine, which is to prevent the "conscious indifference or procrastination" of a claimant. Id. at 976.

Here, both Fonnie and Robert delayed asserting any claim to the Collection, and their delay is inexcusable. If they valued their ownership rights, they would have attended to the passing of the Collection from generation to generation, to ensure that their interest was reflected in any estate papers. Instead, both of them knew the Collection was being possessed and controlled exclusively by Nellie and Margaret, a condition in which they acquiesced either happily, or without obtaining some writing that would indicate they still maintained an inter-

est in the artwork. Their conduct appears to be a case of conscious indifference, acquiescence, or procrastination, any of which is addressed by barring Robert's subsequent claim. Robert is chargeable with Fonnie's indifference and delay in that he could only inherit what she had, and she most likely had no claim. If she had a claim, it would have been barred by laches at the time of her death.

An even stronger case for laches is found in the fact that Robert inquired about Nellie's estate in 1968, and after learning that the entire Collection was listed as hers alone, he failed to present a competing claim to the property. When he made this discovery Robert should have known that his alleged interest was in jeopardy. In 1972, he learned that six years earlier Spanierman had purchased approximately 140 pieces from the Collection, and that the dealer claimed exclusive ownership rights to those pieces. Yet Robert admits that he waited until 1974 before he contacted his cousin, Margaret, to ask for his share of the collection. She responded to his inquiries with little or no information, and eventually with anger. By that time, it would have been apparent to any reasonable person that Hutchinson's alleged ownership rights were being denied.

Finally, when Hutchinson "demanded" a share of the Collection in 1974, and learned that the remaining items had been pledged as collateral for a personal loan to the Thompsons, he was further alerted to the precarious position of his alleged interest. If the Thompsons, who were apparently in a financially precarious position, had defaulted on the loan, the last of the artwork would have become the bank's property. By accepting this last blow without a fight, Robert exhibited conscious indifference or procrastination of his own. In addition, the fact that Margaret sold most of the artwork in 1966, and encumbered the remainder as collateral for a personal loan in the early 1970s, indicates a material change in her position that satisfies the reliance component of the laches analysis. This finding results

in a laches defense barring any claim regardless of whether the relevant statute of limitations has run. See Shaefer, 667 N.E.2d at 231.

Relying on a Fourth Circuit opinion, Robert attempts to demonstrate that Margaret's conduct revived his interest in the Collection, by tolling any statute of limitations. See Barry v. Donnelly, 781 F.2d 1040 (4th Cir. 1986). Robert has testified that when he asserted his claim to the artwork, Margaret said she would settle with him once the bank was paid off. However, during her deposition, Margaret denied having said this. The problem is that Robert and Margaret are both dead and consequently are unavailable to testify before the trier of fact about this exchange. The only aspect of their 1974 encounter on which Margaret and Robert agree is the fact that it was awkward and uncomfortable for both of them.

Because resolving the partition claim would require deciding ownership interests that passed by intestacy, as well as a demand against an ancestor, the testimony from either Robert or Margaret, or their successors in interest, would be inadmissible due to its incompetence under Indiana's Dead Man's Statute.[9] That statute provides:

> In all suits by or against heirs or devisees, founded on a contract with or demand against the ancestor, to obtain title to, or possession of property, real or personal, of, or in right of, such ancestor, or to affect such property in any manner, neither party to such suit shall be a

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[9] Hutchinson's daughter, Anne, allegedly witnessed the discussion in 1974 between her father and Margaret about the alleged settlement promise, but her testimony about its content is inadmissible hearsay and is barred by the Dead Man's Statute. See Dubois County Mach. Co. v. Blessinger, 299 N.E.2d 207 (Ind. App. 1973).

> competent witness as to any matter which occurred prior to the death of the ancestor.

Ind. Code § 34-1-14-7. "The central purpose of the Dead Man's statute is to ensure that when one party to a transaction has had her lips sealed by death the other party's lips are sealed by law." Taylor v. Taylor, 643 N.E.2d 893, 897 (Ind. 1994).

Statutes such as this exist to prevent controversies that may have been amicably settled by the decedents (or their ancestors) from being revived by the successors in interest. The Court will not speculate as to the many possible reasons that my explain why Florence Robinson had possession of the entire Collection when she died, or why Fonnie Hutchinson allowed her sister, Nellie, to retain possession from the time of their mother's death. Whatever reasons there were for allowing only one member of the family to remain in possession of what is argued to be common property cannot possibly be discerned now after the deaths of three generations of heirs and alleged cotenants. Consequently, the Dead Man's statute bars any evidence of what Nellie or her daughter Margaret said in connection with the Collection.

However, a party can "relinquish the benefit" of this statute. Id. at 895. Indiana courts have stated that a party who uses a deceased witness's deposition for an evidentiary purpose, which testimony concerns matters within the Dead Man's statute, has waived the incompetency of the witness. Id. Here, Margaret's deposition was placed in evidence by the Hutchinsons, and Robert's deposition was offered by Margaret. The incompetency of those two witnesses would seem to have been waived by the very opponents who could have raised the issue. Of greater concern, however, is how that testimony can be used.

With respect to the issue of whether Margaret had revived Robert's ownership interest by promising to settle with

him, Robert has the burden of proof. The Hutchinsons argue that Margaret was equitably estopped from employing the statute of limitations bar because she made a statement on which Robert reasonably relied, which lulled him into delaying to bring suit for a period of time that exceeded the statute of limitations. To constitute an estoppel, the defendant's conduct "must be of a caliber calculated to lead the other party to inaction." Paramo v. Edwards, 563 N.E.2d 595, 599 (Ind. 1990). Mere willingness to discuss settlement, without more, does not toll the statute of limitations. Id. "To create an equitable estoppel, the conduct of the [defendant] must be of a sufficient affirmative character to prevent inquiry or to elude investigation or to mislead and hinder." Id.

In this case, the Hutchinsons have failed to point to sufficient evidence to raise a genuine issue of fact for trial about whether Margaret made an affirmative statement that would prevent inquiry, elude investigation, or mislead or hinder. At most her deposition testimony, as well as Robert's, is ambiguous, and at the least it is nothing more than an expression of a willingness to negotiate at some unspecified time in the future. Because neither Margaret or Robert are available for further testimony before the finder of fact, the only competent evidence on this issue is what is contained in their depositions. Margaret's alleged statement that she would settle with Robert after the bank has been paid is not sufficient evidence to allow a rational factfinder to infer that she would give him an amount equal to one-half undivided interest in the Theodore Robinson Collection. Nor is it enough on which to base a finding that Robert's reliance on her statement in forebearing to press his alleged claim was reasonable.

In addition, Robert did not claim to have discussed settlement or the alleged promise to settle with Margaret again in the ensuing years between 1974 and 1980, when he finally sued. Such inactivity would defeat any finding that he reasona-

bly relied, year after year, on a vague promise to "settle" when a bank loan was paid off. See Stitt v. Williams, 919 F.2d 516, 523 (9th Cir. 1990) (noting that if the factual context makes the plaintiff's claim of reliance implausible, that party must present more persuasive evidence to support an estoppel theory). At the time the alleged promise was made nearly all of the collection had been sold or encumbered, Robert had learned that Margaret's financial condition was not good, he had had almost no contact with her for years, the contact they had was less than amicable, and she repeatedly denied he had any right to the Collection.

Given this context, and the absence of any subsequent negotiations, Robert could not be found to have reasonably relied on the alleged promise in forebearing to bring suit. Even if it was initially reasonable for him to rely on the 1974 statement about settling, Robert had a duty to remain diligent about filing a claim once the bank loan was paid off and Margaret failed or refused to settle. See Ferrell v. Geisler, 505 N.E.2d 137, 139 (Ind. Ct. App. 1987) (stating that estoppel will be denied if the plaintiff fails to exercise due diligence in filing a claim after the equitable grounds cease to be operational as a basis for the delay). No evidence was presented on which a rational finder of fact could find Robert's six-year delay reasonable.

Consequently, this Court finds that Robert's alleged ownership interest in the Collection had expired at the latest by the time Nellie's estate was closed, and it was not revived by any statements made by Margaret in 1974 about a possible settlement.

B. STATUTE OF LIMITATIONS

An alternative reason on which the pending motions may be resolved is the statute of limitations issue.[10] Although Indiana courts have decided that the catch-all fifteen year statute of limitations applies to partition of real estate once an ouster occurs, it is not clear that the same result obtains for personal property. Nor is it clear that, assuming that Robert could have proven his ownership rights, a partition action was a viable option at the time his inquiries were rebuffed by his cousin. Indeed, Spanierman argues that it is equally reasonable to term what occurred to the Collection in 1966 as conversion by Margaret of Robert's personal property. An action for a remedy based on conversion would be governed by a two-year statute of limitations. See French v. Hickman Moving & Storage, 400 N.E.2d 1384, 1389 (Ind. Ct. App. 1980); Rush v. Leiter, 271 N.E.2d 505, 507 (Ind. Ct. App. 1971).

Under Indiana law, tortious conversion does not require a specific state of mind for liability to attach. Computers Unlimited v. Midwest Data Sys., 657 N.E.2d 165, 171 (Ind. Ct. App. 1995). Rather, it

> consists either in the appropriation of the personal property of another to the party's own use and benefit, or in its destruction, or in exercising dominion over it, in exclusion and defiance of

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[10] The Hutchinsons moved for partial summary judgment ostensibly on this issue alone, but the arguments presented in their brief extended to the other issue of Robert's ownership interest in the Collection. That issue was also raised in the responsive briefing of the defendants. Thus, the Court has resolved all of the pending motions on that ground, but will address the Hutchinsons' statute of limitations arguments in an effort to provide guidance on any remaining issues in either EV 90-43 or EV 90-44.

> the rights of the owner or lawful possession, or in withholding it from his possession, under a claim and title inconsistent with the owner's.

Id. (citing Shank Fireproof Warehouse Co. v. Harlan, 29 N.E.2d 1003 (Ind. App. 1940). Withholding personal property from another's possession under a claim of title that is inconsistent with the other's interest in that property is actionable even without evidence of ordinary adverse possession elements, including hostility by the possessor. See French, 400 N.E.2d at 1388-89 (stating that a cause of action accrues when the injury to personal property occurs and notice to the plaintiff is immaterial). Consequently, with the tort of conversion, good faith is not a defense. Id.

In the context of a cotenancy relationship, proving conversion requires something more than is required for ordinary tortious conversion. See Robinson v. Dickey, 42 N.E. 679, 680 (Ind. 1896). Because a cotenant has an equal right to possess the property, and may in fact enjoy exclusive possession, it is more difficult to determine when a conversion has occurred. For possession of the property by one cotenant to be tortious, there must be either a demand for possession and attendant refusal, or a showing that some disposition was made of the property "inconsistent with and destructive of the rights" of the cotenant. See Union Naval Stores v. United States, 240 U.S. 284, 292-93 (1916). The exception to a demand requirement occurs when the demand would be futile, or it would be impossible to return the property. United States v. Fullpail Cattle Sales, Inc., 617 F. Supp. 73, 75 (E.D. Wis. 1985).

In sum, one cotenant may convert common property from another "if such cotenant renders impossible any further enjoyment of it by his cotenant or refuses to appropriate it to the use for which it is designed, and appropriating it to uses for which it was not designed, or directly and positively excludes

the cotenant from its use." Bimel v. Boyd, 101 N.E. 657, 658 (Ind. App. 1913). Without such proof it would be impossible to show that a cotenant's exercise of control over the common property was unauthorized.

Here, there was both a refusal of a demand for possession and a use of the property that is inconsistent with and destructive of the rights of the cotenant. Margaret arguably converted the artwork in the Collection when she sold most of it to an art dealer in 1966, without telling the dealer about the possibility of any joint ownership interest, and without first obtaining Robert's consent to the transfer. In that respect, she had used the property in a way that was inconsistent with and destructive of Robert's alleged ownership interest. The Hutchinsons acknowledge that a cotenant may be entitled to convey her share of the common property, in which case a new cotenancy occurs, but only if she informs the new owner of the nature of the interest she is conveying. See Sims v. Dame, 15 N.E.2d 217, 219 (Ind. 1888). She may not, however, "sell or otherwise dispose of the whole property without authority from [her] cotenant. . . ." Id.

If a cotenant does purport to convey the whole of common property, a conversion has occurred. Id. The Sims court noted that when one cotenant of chattel "converts the whole to his own exclusive use, or does something equivalent to an utter denial of the rights of his co-owner, he becomes liable to such co-owner for the injury thereby inflicted." Id. (emphasis added). Under Indiana law, a conversion, which is characterized as an injury to or violation of a person's interest or rights in property, does not require that the property be conveyed to a third person. See Rush, 271 N.E.2d at 507-08 (noting that property is more than the mere thing a person owns, it includes the right to acquire, use, and dispose of it).

The Hutchinsons are adamant that the 1980 case did not seek damages for tortious conversion of the paintings that had been sold. They also agree that a two-year statute of limitations would bar any such relief. Instead, they argue that the earlier case sought partition and an accounting for all the proceeds of the sale. A fifteen-year statute of limitations is urged based on an analogy to a partition of real property. However, courts do not attend just to the language used by a plaintiff to characterize a claim. Instead courts examine the true nature of the claim and the relief sought. It is the remedy sought, not the legal theory being propounded, that determines the applicable statute of limitations. See Bennett v. Bennett, 361 N.E.2d 193, 196 (Ind. App. 1977) (noting that courts look favorably on statutes of limitations, but will not interpret them so as to reach an absurd result).

Although the partition statute refers only to real property, Indiana courts have applied it to personal property as well. See Willett v. Clark, 542 N.E.2d 1354, 1357 (Ind. Ct. App. 1989) (stating that a cotenant of personal property has a right to have it partitioned). Nevertheless, the law has always recognized a difference between how real and personal property are treated. See Robinson, 42 N.E. at 680 (noting that unlike real estate, which is susceptible of a common possession and enjoyment, personal property is not, and exclusion by one cotenant of the other had no remedy at law absent a conversion). The equitable remedy of partition in the personal property context is aimed at compensating a cotenant for a violation of or injury to his or her rights and interests in the property. In that respect, it is virtually indistinguishable from a remedy for conversion in the same context.

Even though the remedy of partition of personal property has been recognized in Indiana, no limitation period has been expressly designated as applicable. Indiana Code § 34-4-5-1 states that an action may be brought by "any person holding

lands as joint tenant or tenant-in-common . . . ." to compel partition thereof. Hare v. Chisman, 101 N.E.2d 268, 271 (Ind. 1951). A suit for partition of real property is subject to a fifteen year statute of limitations, which runs "in favor of a cotenant in possession" once there is an ouster. Hare, 101 N.E.2d at 271. Whether that limitations period applies to an action to partition personal property is the issue. The key to resolving the issue is to examine the true nature of the claim.

All of the cases cited by the Hutchinsons in support of their contention that a fifteen year statute of limitations applies to an action for partition of personal property dealt with cotenancy in real property. The two Indiana cases mentioning partition of personal property do not discuss the issue of timeliness. Thus the Court must rely on the usual principles for determining the relevant statute of limitations, which is a question of law. In determining the appropriate limitations period, Indiana courts refer to the nature of the harm alleged, or the nature or substance of the cause of action, rather than the theory of recovery presented. Whitehouse v. Quinn, 477 N.E.2d 270, 273-74 (Ind. 1985); O.K. Sand & Gravel, Inc. v. Martin Marietta Corp., 819 F. Supp. 771, 780-81 (S.D. Ind. 1992), aff'd, 36 F.3d 565 (7th Cir. 1994).

The event that triggers the running of a statute of limittions against a cotenant is ouster. Ouster requires "express denial of the title and right to possession" of the cotenant, which denial is open and unequivocal. Hare, 101 N.E.2d at 271. Thus, an "ouster" in the personal property context can only mean in injury has occurred to a cotenants' right of possession and interests in that property. Indiana law provides a two-year statute of limitations for injury to personal property, which courts have deemed includes any violation of a person's rights or interests in and to personal property. Ind. Code § 34-1-2-2; Rush, 271 N.E.2d at 507-08. Given the breadth of the definition used by Indiana courts for the term "injury to property" in the

two-year statute of limitations, this Court is hard-pressed to discern a difference between the type of ouster that would trigger the running of a statute of limitations against a cotenant and an injury to personal property.

By alienating and encumbering the items in the Collection, Margaret treated the property in a manner that was inconsistent with Robert's ownership interests. Further back, Nellie's estate, which listed the Collection as solely her property, likewise handled the property in a manner inconsistent with Robert's alleged rights. These incidents represent an injury to Robert's alleged rights and interests in personal property as a cotenant. Indiana law has a statute of limitations that specifically addresses that type of harm. In contrast, the catch-all statute of limitations expressly states that it applies to all "actions not limited by any other statute," and if the cause of action arose before 1982, the case must be brought within fifteen years. Ind. Code § 34-1-2-3. If more than one statute applies, the one that is more recent or specific will prevail over an older, more general one. See Ferguson v. Modern Farm Sys., Inc., 555 N.E.2d 1379, 1384 (Ind. Ct. App. 1990). Here, the catch-all statute is more general, while the two year statute is more specific. This Court finds that partition of personal property is governed by the statute of limitations applicable to injury to personal property.

Robert's cause of action seeking partition accrued no later than 1974, when he was rebuffed by his cousin during his attempt to claim his alleged share of the Collection. That is the time when a denial of his right or interest in the Collection was unequivocally expressed to him. The undisputed evidence also supports a finding that the cause of action accrued earlier, such as in 1968, when Robert learned that Nellie's estate listed the entire collection as hers, or in 1972, when he learned that Spanierman had purchased most of the Collection. Margaret's treatment of the portion of the Collection she sold as if she were

conveying the whole was sufficient to satisfy the requirement that she treat the property inconsistently with Robert's alleged ownership interests.

Regardless of which date is used for accrual, Robert's action for partition of the property remaining in Margaret's possession in 1980 became untimely no later than August of 1976. Consequently, the action brought in 1980, to the extent it sought a remedy for the damage caused to Robert's alleged ownership interests by Margaret's conduct, was untimely.

III. CONCLUSION

The Court has held that the ability of the Hutchinsons to establish joint ownership of the art collection at issue is barred by the doctrine of laches. Any ownership interest that may have been enjoyed by their ancestors had lapsed as of the time the action for partition was first brought, and most likely sooner. Their ancestors' refusal to protect the interest in the Collection in the face of successive transfers of possession through intestate succession and the possessors' conduct that was inconsistent with the Hutchinson's alleged ownership rights, subjected their claim to the equitable bar of laches. This finding leads to a corresponding finding that Robert Hutchinson had no standing in 1980 to bring a suit seeking partition. Consequently, the 1980 claim for partition cannot be continued under the Indiana Journey's Account statute in the current EV 90-43 case. The Hutchinsons's motion asking the Court to deem the EV 90-43 case a continuation of the earlier case is hereby **DENIED.**

Similarly, the finding that Robert had no standing to bring a claim for partition in 1980 means that the Hutchinsons cannot attribute the failure of the earlier case to their attorneys' conduct. Thus, they cannot prove the causation or damages elements of their malpractice, constructive fraud, collusion or wrongful interference claims. Counts 1, 2, 3 and 4 of EV-90-44

against the Bamberger defendants must fail, and their motion for summary judgment on those claims is hereby **GRANTED.**

Finally, the Hutchinsons moved for partial summary judgment on the legal issue regarding the appropriate statute of limitations for an action for partition of personal property. This Court has found that, just as with an action for partition of real property, the statute of limitations to partition personal property does not begin to run until an ouster occurs. In the context of personal property, however, ouster is nothing more than the refusal of a demand for possession, or treatment of the property in a manner that is inconsistent with and destructive of the rights of the cotenant. Viewed in that light, ouster can only be characterized as an injury to or violation of another's interest or rights in personal property.

Consequently, the ouster that is necessary to trigger the running of a statute of limitations falls within the scope of Indiana's two year statute of limitations for actions based on conversion or injury to personal property. Regardless of whether ouster is characterized as a conversion, or merely as an injury to personal property, the event that triggers the limitations period here is subject to a specific statute of limitations for injury to personal property. Thus, the Hutchinsons's motion for partial summary judgment on the statute of limitations issue is **DENIED,** and partial summary judgment is **GRANTED** in favor of the defendants who argued that the 1980 action was untimely.

IT IS SO ORDERED this 22 day of January, 1997.

/s/ Larry J. McKinney
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

APPENDIX C

[Filed May 13, 1997]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

Cause No. EV 90-44-C M/H

THOMAS R. HUTCHINSON, Individually and as Personal Representative of the Estate of Robert W. Hutchinson, deceased and the Estate of Anne E. Hutchinson, deceased,

Plaintiffs,

v.

IRA SPANIERMAN, et al.,

Defendants.

(Related Case)
Cause No. EV 90-43-C M/H

THOMAS R. HUTCHINSON, Individually and as Personal Representative of the Estate of Robert W. Hutchinson, deceased

Plaintiffs,

v.

EARL H. RICHERT, Personal Representative of the Estate of Gordon Sterling Thompson, et al.,

Defendants.

ORDER ON MOTIONS TO VACATE, TO SUBSTITUTE, AND FOR SUMMARY JUDGMENT

This recently-revived matter, Cause Number EV 90-44, has come before the Court on several motions from the plaintiffs, Thomas R. Hutchinson, Individually and as Personal Representative of the Estate of Robert W. Hutchinson and for the Estate of Anne E. Hutchinson, deceased, (the "Hutchinsons"), and from defendants Ira Spanierman, Ira Spanierman, Inc., and Spanierman Gallery (the "Spanierman Defendants"), and William E. Jageman and Jageman & McGraw, Inc. (the "Jageman Defendants"). On January 2, 1997, the Hutchinsons filed a motion to substitute the administrator of the Estate of William E. Jageman under Fed. R. Civ. P. 25(a) for William E. Jageman, deceased, and to make corresponding amendments to the caption. Objections were raised on behalf of William E. Jageman, deceased, by both his counsel (February 5, 1997) and the administrator of his estate, Barbara A. Jageman (March 4, 1997). The objections are based on claims that the motion to substitute was untimely and was not properly served on the administrator.

Similarly, a motion to substitute Thomas R. Hutchinson for Anne E. Hutchinson, deceased, was filed on April 8, 1997, pursuant to Rule 25(a). Anne died intestate in January of 1995, leaving Thomas as her sole surviving heir, and as the named personal representative of the estate. Anne's estate has been closed, but her claims in this action were not extinguished by her death. Thus, Thomas seeks to substitute himself as her personal representative and only distributee, for purposes of this litigation. No objections have been filed by any defendants with respect to this motion and the Court will **GRANT** same as of the date of this order.

The Jageman Defendants filed a motion for summary judgment on February 3, 1997, and the Spanierman Defendants

filed a similar motion on February 7, 1997. The Hutchinsons were ordered to respond to these motions by April 1, 1997, by the Magistrate Judge's order entered on February 18, 1997. Their response was allowed to be combined with their response to a pending motion to dismiss the related case, Cause No. EV 90-43-C.[1] In addition to opposing the pending motions, the Hutchinsons took exception to the Court's January, 1997 Order. That order contained a ruling against them on the issue of timeliness of the partition action filed in 1980 by Robert W. Hutchinson. On April 1, 1997, the Hutchinsons filed a combined motion to vacate and motion for summary judgment on the issue of liability in this cause. The combined motion is alleged to have been brought pursuant to Rule 56(a), (c) and (d) of the Federal Rules of Civil Procedure, and in it the plaintiffs argue that the Court's January 22, 1997 Order was completely wrong.

According to the Hutchinsons, summary judgment should be entered in their favor on the very issues the Court has decided against them. Responses were filed by the Jageman Defendants, and by defendant Robert H. Hahn, and his firm Bamberger Foreman Oswald & Hahn (the "Bamberger Defendants"), opposing the motion to vacate the January, 1997 Order. These defendants also filed a motion to extend the time in which they must respond to the Hutchinsons's motion for summary judgment until after the Court rules on the motion to vacate. They reason that if the Court denies the motion to vacate, a response to the summary judgment motion will be unnecessary. Although the Hutchinsons contest the motions for extensions of time, they nevertheless ask for a similar extension

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[1] For purposes of resolving both the Jageman Defendants and the Spanierman Defendants' motions for summary judgment, the Court deems the Hutchinsons' Combined Brief in Support of Plaintiff's Mot. To Vacate January 22, 1997 Order and Enter Sum. J. Against Bamberger and Jageman Defendants and in Oppos. to Defs' Mot. For Sum. J. and to Dismiss as a responsive pleading.

of time in which to file a combined reply brief on the motion to vacate and for summary judgment. Both of these motions are **OVERRULED** for the reasons discussed below.

I. MOTION TO VACATE JANUARY 22, 1997 ORDER

The Court finds it unnecessary to allow an extension of time for the Hutchinsons to file a reply brief on their motion to vacate and for summary judgment. Although the motion is claimed to have been brought pursuant to Rule 56, no authorization is found in that rule for a motion to vacate. The motion could have been designated a motion to reconsider under Rule 59 had it been filed within ten days of the date of the order being challenged. *See* Fed. R. Civ. P. 59(b); *Kunik v. Racine County*, 106 F.3d 168, 172-73 (7th Cir. 1997). Instead, the motion will be deemed to have been under Rule 60, Relief from Judgment or Order. Fed. R. Civ. P. 60(b). For purposes of determining the standards under which the motion should be resolved, the Court finds no other applicable rule of procedure.

Rule 60(b) provides that the court may relieve a party from a final judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is

based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

The Hutchinsons's motion fails to specify under which subsection they are proceeding.

"Relief from a judgment under Rule 60(b) is an extraordinary remedy and is granted only in exceptional circumstances." *Dickerson v. Board of Educ.*, 32 F.3d 1114, 1116 (7th Cir. 1994); *Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1277 (7th Cir. 1990); *Wilson v. Studebaker-Worthington, Inc.*, 699 F. Supp. 711, 715 (S.D. Ind. 1987). Whether to grant relief under Rule 60(b) is addressed to the sound discretion of the district court. *Williams v. Hatcher*, 890 F.2d 993, 995 (7th Cir. 1989). A Rule 60(b) motion cannot substitute for an appeal and an appellate court will not reverse a denial of such a motion unless there is a "showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust." *Donald v. Cook County Sheriff's Dept.*, 95 F.3d 548, 554 (7th Cir. 1996).

The Hutchinsons did not file a timely Rule 59(e) motion to alter or amend the summary judgment, nor did they designate their motion to vacate as a Rule 60 motion. Nevertheless, because the Court deems it so, it must also decide which of the circumstances justifying such relief should apply. The only one that could encompass the Hutchinsons' arguments would be the catch-all provision, "any other reason justifying relief from the operation of the judgment." This provision, however, cannot be invoked unless none of the other provisions apply. *See Central States, SE and SW Pension Fund v. Central Cartage Co.*, 69

F.3d 1312, 1315 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 1419 (1996). Upon review of the Hutchinsons's motion, the Court is satisfied that none of the other circumstances are relevant to this analysis.

Instead of providing reasons to justify relief from summary judgment the Hutchinsons merely explain the reasons why they think the Court's decision was wrong. "Judgments in civil cases fix the rights of parties and entitle them to go about their lives." *Methyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 830 (7th Cir. 1985). That is why they are reopened only for extraordinary reasons. *Id.* Part of the reason for this emphasis on the finality of a judgment is to induce "parties to focus all of their efforts in a single proceeding." *Id.* If the parties know that

> the judgment will establish their rights once and for all, they will bring to bear the information and energies necessary to produce an informed decision. If they believe that they can have a second try, they are more likely to skimp the first time around, and as a result the judicial process will become less accurate.

Id. Moreover, a second proceeding may be less accurate as the passage of time dims memories and makes evidence more difficult to find, and less reliable as the lens of hindsight refocus the testimony and the issues of the case. *Id.* Finally, there is no guarantee that the second process will be more accurate than the first. For all of these reasons, the rule that judgments are not to be revisited absent compelling and exceptional circumstances is vitally important to the judicial process. *Id.* at 831.

According to the Hutchinsons's own motion, fourteen grounds justify the relief they seek from the summary judgment. First, they argue that the Court's analysis of whether a statute of limitations or laches defense would have barred the 1980 case

was inappropriate because the defendant in that case had waived those defenses. *See* Plf's Mot. To Vacate January 22, 1997 Order and Enter Sum. J. Against Bamberger and Jageman Defs. In EV 90-44-C on the Liability Issue at ¶ 1-3. Thus, they contend the Court's finding of untimeliness was wrong. In their view, this finding was "contrary to circuit law and subject to reversal on appeal." *Id.* ¶ 3. Being subject to reversal on appeal does not render a decision unjust such that the Court must vacate the judgment. Even if this were a Rule 59 motion, however, the Court would still not be inclined to reverse its findings. Upon even a cursory review of EV 80-104-C, the Court notes that these defenses were not waived.

Next, the Hutchinsons disagree with the Court's findings that Robert Hutchinson failed to prove his ownership interest in the Theodore Robinson Collection and that he therefore lacked standing to bring a partition action. *Id.* ¶¶ 4-5. Essentially, the plaintiffs contend that they did not have notice that they would need to produce evidence establishing Robert's ownership when they defendant against the Bamberger defendants' motion for summary judgment in EV 90-44-C. Instead, the pending motion was addressed to whether the 1980 litigation was time-barred, which the Hutchinsons describe as a purely legal determination. This argument is without merit. In a typical legal malpractice case, a plaintiff must show that the incompetence or negligence of the attorney caused the plaintiff to lose part of all of his case. *American Internat'l Adj. Co. v. Galvin*, 86 F.3d 1455, 1459 (7th Cir. 1996). Because such a determination requires analysis of the merits of the underlying case, and because the merits of the 1980 Case required proof of ownership, the Hutchinsons' contention that they had no notice of this issue is inaccurate. Not only did they have notice, but they have had nearly seventeen years of litigation in which to gather and present their proof regarding ownership.

The Hutchinsons also set forth nine allegedly undisputed facts that this Court supposedly ignored when it decided the

1980 case was not viable, which finding defeated the malpractice case against the Bamberger Defendants. Those "facts" however, were not undisputed and were subject to competing inferences. The Court considered each of these proposed facts when it made its findings for the prior decision, and found that insufficient evidence existed to support the Hutchinsons's version. The fact that the plaintiffs disagree with the Court's factual findings or its interpretation of Indiana law does not constitute the type of extraordinary circumstances that would justify relief from judgment. Nor does the interpretation of Indiana law offered by the Hutchinsons in ¶¶ 6-7 provide a reason for this Court to vacate its decision.

The Hutchinsons also claim that a number of the Court's findings lacked evidentiary support, without specifically pointing to any evidence contradicting those findings. Plf's Mot. To Vacate, ¶ 8. This assertion is another example of the plaintiffs revisiting the merits of the Court's decision, and not focusing on any extraordinary circumstances that would form the basis for abandoning a final decision. It is also an illustration of the unfortunate exaggeration and inaccuracies plaguing the Hutchinsons's brief. For example, paragraph nine of their motion peculiarly sets forth the fact that Hahn and Jageman, as attorneys, were presumed to know the law, without enlightening the Court as to how this fact justifies vacating the January 22, 1997 Order. Another allegedly undisputed fact is the allegation that Hahn and Jageman breached their duty to Robert Hutchinson when they failed to "alert Judge Brooks to the fact that Margaret Thompson's motion for summary judgment did not address their client's partition action. . . ." *Id.* ¶ 10.

Other breaches of duty were attributed to Hahn and Jageman as undisputed facts that render the Court's decision unjust. For example, their failure to file a cross-motion for summary judgment in the 1980 case on the issues of Robert's intestate interest in the Collection, Margaret's alleged abandon-

ment of her affirmative defenses to the partition action, and the failure of Spanierman to raise adverse possession as an affirmative defense constituted such breaches. *Id.* ¶ 11. Further, they argue that Hahn's advice against appealing Judge Brooks' decision in the 1980 case was either a breach of duty or a deliberate effort to mislead and intimidate the Hutchinsons and their probate attorney. *Id.* ¶ 12. Even worse, Jageman allegedly breached his duty to the plaintiffs by failing to disagree with Hahn's interpretation of the law and to provide them with contrary advice. *Id.* ¶ 13. Finally, the Hutchinsons contend that Hahn's and Jageman's negligent or intentional breach of duty was the proximate cause of their damages.

In addition to obtaining relief from the Court's January 22, 1997 decision, the Hutchinsons also claim entitlement to summary judgment against Hahn and Jageman on the liability issue. Correspondingly, they ask the Court to render findings of fact consistent with their proposed facts, which they claim "appear without substantial controversy, including the timeliness of the partition action filed by Robert W. Hutchinson." *Id.* at 8. The Court detects a common pattern among all of the facts and arguments the Hutchinsons promote as justifying the relief they seek: they are directed at obtaining a reconsideration of the merits of the earlier decision. Such a reconsideration cannot be obtained by filing a "motion to vacate" nearly two and one-half months after the decision being challenged. *See Kunik*, 106 F.3d at 173 (noting that a motion designated one for reconsideration but filed beyond the ten day period allowed in Rule 59, falls under Rule 60(b)).

Instead, the only way to test the validity of the Court's decision on the merits is to file an appeal. A Rule 60(b) motion cannot substitute for an appeal. *Donald*, 95 F.3d at 554. Further, the narrow circumstances that lead a court to vacate an earlier decision are even narrower when the catch-all provision forms the basis for the requested relief. *See Provident Sav. Bk.*

v. Popovich, 71 F.3d 696, 700 (7th Cir. 1995) (stating that in a rule already limited in application to extraordinary circumstances, resort to the catch-all provision is "even more highly circumscribed"). It appears that the Hutchinsons are merely attempting to raise additional arguments in support of their view of the facts and the law and against the Court's as reflected in its decision. If so, their efforts must fail. "Failing to raise all available theories [before] . . . does not justify relief under Rule 60(b)(6)." *Popovich*, 71 F.3d at 700. A court should deny a Rule 60(b)(6) motion unless there is a "showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust." *Donald*, 95 F.3d at 554.

No such showing has been made here, and the Hutchinsons's motion to vacate the January 22, 1997 Order is **DENIED.** The Jageman Defendants, who faced the same allegations as the Bamberger Defendants, have now moved for summary judgment as well. The Court finds that for all the reasons supporting summary judgment in favor of the Bamberger Defendants, the Jageman Defendants' motion should be **GRANTED.** The motion for summary judgment on liability that accompanied the Hutchinsons's motion to vacate is likewise **DENIED,** although technically it should be designated as moot.

II. SPANIERMAN MOTION FOR SUMMARY JUDGMENT IN EV 90-44-C

To facilitate resolution of the Spanierman Defendants' motion, it would be useful to review the first amended complaint and determine the specific claims raised against these defendants. In Count III, Hutchinson alleged that the Spanierman defendants, the Kennedy Galleries, Inc. (the "Kennedy Galleries"), Charles L. Berger, Berger & Berger (the "Berger Defendants"), Barry J. Boxer, and Rose & Boxer (the "Boxer Defendants") jointly interfered with a valid attorney-client relationship. Specifically, he alleges that "with full knowledge of

Hutchinson's attorney-client relationship with an associate assigned to handle the *Hutchinson* case . . . Berger intentionally induced Hahn to disregard those duties, fire the associate . . . and represent Hutchinson . . . in a less than zealous manner. . . ." Am. Compl., Ct. III, ¶¶ 3-4. On March 22, 1991, however, Hutchinson voluntarily dismissed, without prejudice, the claims asserted in Count III against the Spanierman Defendants, the Kennedy Galleries, and the Boxer Defendants. At that point, Count III remained viable only against the Berger Defendants. On January 28, 1993, all claims against the Berger Defendants were dismissed, without prejudice. Thus, Count III is no longer viable against any defendants.

Count IV was brought against all named defendants and alleges that they colluded to coerce and deceive Robert Hutchinson and his personal representative into relinquishing the claims asserted in the 1980 Case. Am. Compl., Ct. IV, ¶¶ 4-6. On November 4, 1991, the collusion claim against the personal representative of the Estate of Margaret Thompson was dismissed. As previously noted, all claims against the Berger Defendants were dismissed in January, 1993. The only defendants remaining in Count IV were the Spanierman Defendants, the Bamberger Defendants, the Jageman Defendants, the Kennedy Gallery and the Boxer Defendants. In Count V, the Hutchinsons claim that the Spanierman Defendants, the Kennedy Galleries, the Boxer Defendants, the Berger Defendants plus Jane and John Does 1-20, have used and continue to use the mail and interstate telephone service to "plan and execute a continuing conspiracy to prevent Hutchinson from learning the identity of those in possession of items comprising the Theodore Robinson collection." Am. Complt., Ct. V, ¶ 10. Such a conspiracy, if proven, could constitute a violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), under the right circumstances. 18 U.S.C. § 1961(1)(A) and (1)(B), § 1962(c), (d).

In its January 22, 1997 Order, this Court found that Robert Hutchinson lacked standing to bring a suit for partition in 1980 because by that time Robert had no valid claim to a one-half interest in the Art Collection at issue. Without an ownership or possessory interest in the property as a cotenant, Robert could not satisfy the case or controversy standing requirement. *See Doe v. County of Montgomery, Ill.*, 41 F.3d 1156, 1159-60 (7th Cir. 1994). Article III of the Constitution requires a party to show that he personally has suffered some actual or threatened injury, that the injury fairly can be traced to the challenged action, and that it is likely to be redressed by a favorable decision. *See generally Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Love Church v. City of Evanston*, 896 F.2d 1082, 1084-85 (7th Cir. 1990)).

Although part of the standing requirement incorporates "merely prudential considerations," at a minimum Article III requires that a plaintiff has suffered an "injury in fact, which is fairly traceable to the challenged action of the defendant and likely, as opposed to merely speculative, to be redressed by a favorable decision." *Doe*, 41 F.3d at 1159 (citing *Valley Forge*, 454 U.S. at 472) (quotations omitted). An injury in fact is defined as an "invasion of a legally-protected interest which is (1) concrete and particularized . . . and (2) actual or imminent and not merely conjectural or hypothetical." *Id.* A prerequisite to determining whether an injury was concrete, particularized, actual or imminent, is that there was a "legally protected interest" that could be invaded by the defendant's conduct. Hutchinson had the burden in the 1980 Case to establish the elements of standing, including establishing the existence of a legally protected interest. His ability to successfully establish same, as this Court has found, was defeated by the fact that he waited too long to assert his alleged interest in and rights to the Collection.

Therefore, no conduct on the part of the Spanierman defendants, whether aimed at colluding with Hutchinson's

former counsel to deceive him into abandoning his claims, or at conspiring with the Kennedy Galleries to further a "fraudulent scheme" to deprive him of his rightful share, could have caused Hutchinson an injury in fact. Hutchinson would have had to possess a valid claim to a one-half share of the Collection to sustain such an injury, and he could not prove such a claim because of his inexcusable delay in asserting his alleged ownership rights. If Hutchinson could not prove he had a right to a share of the Collection, then he also could not prove that any of the challenged conduct in connection with the 1980 Case deprived him of that right or caused his alleged injury.

The two charges that form the basis of Counts IV and V against the Spanierman Defendants, which Hutchinson designates as "Collusion" and "RICO" claims, respectively, cannot be sustained in the absence of an ability to prove ownership of a one-half interest. Hutchinson confuses the issues when he argues that the Court did not allow him the opportunity to defend his ownership rights, and thus it should not have found him to have no standing. There are only a certain number of ways that a party can prove ownership of personal property. The most powerful method is to show actual, continuous possession of the property for the period of time in question. Another way is to offer some writing that demonstrates an ownership interest. Finally, an interest may be traced by oral testimony of witnesses to transactions in which the respective interests in the personal property were discussed.

With respect to the first two methods, neither Hutchinson nor his immediate ancestors have been shown to have possessed any part of the Collection during the relevant time. Nor has any writing been offered to demonstrate Hutchinson's alleged interest. In fact, evidence to the contrary appears in the record. Nellie Terhune's estate papers listed her as the exclusive owner of the Collection, and Robert was aware of that fact in 1968. *See* J. Brooks''s 1988 Order at 12, Plfs. Exh. 25. The only other way that Hutchinson could possibly support a claim

to ownership of the Collection would be to offer oral testimony of witnesses to various transactions or discussions relating to establishing the relative interests in the property.[2]

This third method of proving ownership is where the laches and statute of limitations defenses defeat Hutchinson's ability to establish a valid claim to ownership. As noted in the January 22, 1997 Order:

> Robert's ability to prove his ownership interest was hampered by the fact that he could not present sufficient competent evidence in support of his claim because he sat on his rights too long and was barred by the doctrine of laches. To counter the evidence of exclusive possession and control of the Collection by the Terhunes and Thompsons, Robert would have needed evidence of some agreement between his mother and himself and the Terhunes and Thompsons regarding that arrangement and acknowledging their equal right to possess the property. None was presented. His effort to demonstrate the existence of a trust during the 1980 action failed.

Jan. 22, 1997 Order at 13. The Court sees no reason to disturb its earlier findings regarding laches and the statute of limitations barring Robert Hutchinson's ability to establish that he had standing to bring a suit for partition. Specifically, this Court

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[2] The Hutchinsons allege that their interest in the Collection derived from intestate succession, but offer no proof of such succession. The Court, however, notes that one of the plaintiffs' exhibits contains no reference to the Art Collection in Florence A. Robinson's Estate. *See* Pltfs' Am. App. To Combined Brf., Exh. 6, "Inventory, Appraisement and Affidavit." Regardless of which state's laws of intestacy apply, it would be impossible to make an ownership determination based on such slight evidence of intestate succession.

found that Robert's alleged ownership interest in the Collection had expired at the latest by the time Nellie's estate was closed, and it was not revived by any statements made by Margaret in 1974 about a possible settlement. It is this finding that defeats the remaining claims against the Spanierman defendants.

The alleged RICO violation, a fraudulent scheme allegedly aimed at allowing the "Kennedy Galleries to obtain as much of the Theodore Robinson Collection as possible and place it in private collections where it would be difficult, if not impossible, for Hutchinson to trace without the aid of court," cannot succeed without proof of Robert's alleged ownership interest. *See* Amended Compl. Ct. V, ¶ 9. Likewise, no collusion on the part of the defendants could have defeated the claims in the 1980 Case or caused Robert any injury to his legally-protected interest, when he could not prove any such interest. For all of these reasons, the Spanierman Defendants' motion for summary judgment on all claims against them is **GRANTED.**

III. MOTIONS TO SUBSTITUTE

For the motion to substitute the administrator of Jageman's estate to be entitled to the Court's attention, it must present a viable issue in light of the Court's refusal to vacate its earlier decision that the 1980 case was untimely and barred by laches. Summary judgment has been found to be proper against the Hutchinsons and in favor of all remaining defendants in this action, which would appear to render it unnecessary to decide the substitution issue. Nevertheless, to ensure that distribution of the California estate of William Jageman is not unnecessarily delayed, the Court finds that the request to substitute the administrator of the estate should be **DENIED.** Under California law, any claims against the estate, including late claims, must be brought within one year of the appointment of the administrator. *See* Calif. Prob. Code § 9103(b). Barbara A. Jageman was appointed as the administrator of the Jageman estate on February

7, 1995. Jageman Aff. ¶ 5, Exh. B. Notices were given to all known creditors, and by publication for benefit of those who were unknown. *Id.* ¶ 4. Barbara states that she had no actual knowledge of this action until shortly after September 26, 1996, at which time she learned of the action and the Hutchinsons and this Court learned of Jageman's death. *Id.* ¶ 7. As of February 6, 1997, no claim had been filed by the Hutchinsons in the California probate court. *Id.* ¶ 9.

According to Rule 25(a)(1), if a party dies and the claim is not extinguished, the court may order substitution of the proper parties. In this case, the claim is not extinguished by Jageman's death, but the circumstances related to the distribution and settlement of his estate are deemed to be so far advanced that it would be unfair to now substitute his estate in this action. Moreover, such substitution would be futile, for the Court has found that summary judgment in favor of the Jageman Defendants is proper. Finally, the Hutchinsons had notice of the death as early as October 11, 1996, and the Court finds no reason to conclude that a motion for substitution could not have been filed sooner than on January 2, 1997. No purpose would be served by granting the motion for substitution in light of the valid reasons offered to suggest that doing so at this late date would impose a hardship on the devisees and on the California probate court. In fact, to rule otherwise would constitute an unnecessary interference by a federal court with the legitimate interests of the State of California in the orderly administration of decedent's estates in that state. For all of these reasons, the Hutchinson's motion to substitute the administrator of Jageman's estate is **DENIED.**

IV. CONCLUSION

The motion to substitute Thomas Hutchinson as personal representative for the estate of Anne E. Hutchinson was **GRANTED** and the caption has been amended accordingly.

The motion to substitute the estate of William Jageman, however, has been **DENIED** as untimely, unfair, and unnecessary. The Court has considered the Hutchinsons's motion to vacate its January 22, 1997, order and has found no "showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust," and no reason to comply with the plaintiff's request. The motion to vacate has been **DENIED.**

With respect to the motions for summary judgment brought by the Spanierman and Jageman Defendants, the Court finds that its determination in the January 22, 1997 Order that Robert Hutchinson had no standing to bring the 1980 action for partition resolves both of these motions. The claims brought against the Spanierman and Jageman Defendants required a showing that some conduct taken by them directly caused the Hutchinsons' alleged injury. This Court has found, instead, that the damage to the Hutchinsons' alleged interest in the Collection was caused by their own inexcusable neglect in not presenting their claims sooner. The partition they sought was barred on the basis of the doctrine of laches. The Court's findings render all the claims against the Thompsons, the Spanierman Defendants, the Boxer Defendants, the Kennedy Galleries, the Berger Defendants and the unidentified defendants invalid. With no valid claim to pursue in the 1980 Case, Hutchinson could not have been injured by his former counsel's alleged inadequate or incompetent pursuit of a remedy in that case.

For all of these reasons, the pending motions for summary judgment are **GRANTED** in favor of the Spanierman and Jageman Defendants, and against the Hutchinsons on all counts of the amended complaint.

IT IS SO ORDERED this 13th day of May, 1997.

/s/ Larry J. McKinney
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

APPENDIX D

[Filed November 4, 1999]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Before

Hon. Harlington Wood, Jr., *Circuit Judge*

Hon. Kenneth F. Ripple, *Circuit Judge*

Hon. Michael S. Kanne, *Circuit Judge*

THOMAS R. HUTCHINSON, individually, and as personal representative of the Estate of Robert W. Hutchinson, deceased, and the Estate of Anne E. Hutchinson, deceased,

Plaintiff-Appellant,

No. 97-2752 v.

IRA SPANIERMAN, individually and as an agent of Ira Spanierman, Inc., Spanierman Gallery and Kennedy Galleries, Inc.; IRA SPANIERMAN, INC.., a voluntarily dissolved New York corporation; SPANIERMAN GALLERY, an unincorporated association, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Indiana, Evansville Division
No. EV 90-44-C-M/H
Larry J. McKinney, Judge.

ORDER

Plaintiff-appellant filed a petition for rehearing and petition for rehearing en banc. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543-0001

WILLIAM K. SUTER
Clerk of the Court

January 19, 2000

Mr. Glenn R. Beustring
2624 East 21st Street
Suite 1
Tulsa, OK 74114

Re: Thomas R. Hutchinson, etc.
v. Ira Spanierman, etc., et al.
Application No. 99A586

Dear Mr. Beustring

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on January 19, 2000, extended the time to and including February 14, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By s/ Ruth Jones

Ruth Jones
Assistant Clerk